QUARTERLY REPORT

OF THE

ATTORNEY GENERAL

OF

ALABAMA

For the Period

April 1, 1948

Through June 30, 1948

Volume No. 51

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from April 1, 1948, through June 30, 1948.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report to be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials.

Very respectfully,

A. A. CARMICHAEL,

Attorney General.

QUARTERLY REPORT
OF THE
ATTORNEY GENERAL

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OPINIONS

April 1, 1948.

Hon. L. R. Grimes,
Chairman, Board of Revenue,
Montgomery County,
Montgomery 4, Alabama.

Counties—Courts of County Commissioners—Boards of Revenue—Contracts.

1. A general contracting corporation, one of whose minority stockholders is also an officer of the corporation and a member of the Board of Revenue of Montgomery County, is not precluded from bidding on contracts and accepting and performing contracts with the Board of Revenue of Montgomery County.

2. An independent contractor who has a contractual and financial arrangement with a general contracting corporation, one of whose minority stockholders is also an officer of the corporation and a member of the Board of Revenue of Montgomery County, whereby the general contracting corporation furnishes labor and materials to the independent contractor in the execution of his contracts, is not precluded from bidding on contracts and accepting and performing contracts with the Board of Revenue of Montgomery County.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of March 29, 1948, is as follows:

"An opinion is requested of your office, as soon as we may get it, answering the following questions:

"1. An officer and minority stockholder in a corporation engaged in the General Contracting Business is a member of the County Board of Revenue. The County Board of Revenue is scheduled to receive sealed, public bids for the erection of a County Jail. Is that Corporation precluded from bidding on such contract, and if that corporation should be the low and successful bidder, is that corporation precluded from taking such contract with the County Board of Revenue?

"2. An officer and minority stockholder of a corporation engaged in the General Contracting Business is a member of the County Board of Revenue. The County Board of Revenue is scheduled to receive sealed, public bids for the erection of a County Jail. That corporation

has a contractual and financial arrangement with an independent licensed general contractor whereby the corporation furnishes labor and materials to that independent contractor in the execution of his contracts. Is the independent licensed general contractor precluded from bidding on contracts with the County Board of Revenue, and if he is the low and successful bidder on such contract, is the independent general contractor precluded from taking such contract with the County Board of Revenue?

"We should like to call your attention to an opinion, dated October 15, 1947, given to Ward McFarland, Highway Director, in the matter of Burgreen Construction Company of Limestone County. In view of this opinion, we hope that you can give us an answer to this request immediately."

In my opinion, your first question should be answered in the negative. I know of no law which prohibits this corporation from bidding on contracts and accepting and performing contracts with the Board of Revenue of Montgomery County. A contract with a corporation is entirely different from a contract with the individuals who compose it. It is a well accepted principle of law that a corporation is a distinct entity to be considered separate and apart from the individuals who compose it.

Navco Hardware Co. v. Bass, 214 Ala. 553, 108 So. 452.

It has been held by former opinions of this office that, in view of such principle of law, there is no prohibition against a county official, on behalf of the county, entering into a contract with a corporation in which he is a stockholder, as such official is not pecuniarily interested in such transaction so as to come within the inhibitions of the statute, now Title 41, Section 211, Code of Alabama 1940. Quarterly Report of Attorney General, Vol. 19, page 236, and authorities cited therein. Cf. opinion of this office rendered to Honorable J. M. Holt, Chairman of the Limestone County Board of Revenue, under date of December 22, 1947 (a copy of which is enclosed for your information), which holds that there is no prohibition against a corporation, owned in part by a member of the Board of Revenue of Limestone County, Alabama, entering into a contract with the State of Alabama for road construction or repair, even though such work be performed in Limestone County, Alabama, and be paid for in part by funds of Limestone County.

In my opinion, your second question should also be answered in the negative. In answering your first question, I have considered the legal propositions involved in your second question. If the corporation, one of whose minority stockholders is also an officer of the corporation and a member of the Board of Revenue of Montgomery County, is not precluded from bidding on contracts and accepting and performing contracts with Montgomery County, it necessarily follows that the independent contractor to whom the corporation furnishes labor and materials is not

precluded from bidding on contracts and accepting and performing contracts with the Board of Revenue of Montgomery County.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 2, 1948.

Honorable Jeff D. Smith, Solicitor,
Twenty-Third Judicial Circuit,
Huntsville, Alabama.

Elections—Challenged Votes.

1. Title 17, Sections 143, 187 and 355, Code of Alabama 1940, are the statutory provisions providing for the challenging of the right of a voter to cast his ballot.

2. Any qualified elector of the precinct in which a person offers to vote or the duly designated election official may challenge the right of any person to cast his ballot.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of March 18, 1948, is as follows:

"Your attention is invited to Sections 187 and 355, Title 17 of 1940 Code of Alabama, also to the following phrase in the first sentence of Section 188 of Title 17 of 1940 Code of Alabama, viz. 'or by any qualified elector.'

"Your opinion is requested as to the following:

"(1) Does Sections 187 and 355 provide the only authority under our present law to challenge a person offering to vote?

"(2) Can any qualified voter challenge any person offering to vote?

"(3) What persons are authorized to challenge people offering to vote?

"The questions above are matters concerned relative to our primary election to be held May 4, 1948."

My answer to your first question is in the negative.

The Sections of the Code of Alabama 1940 which authorize the challenging of votes are Title 17, Sections 143, 187 and 355. These sections read respectively as follows:

"§ 143. Challenge of voters.—Any qualified elector of the precinct in which any person proposes to vote shall have the right to challenge such person so offering to vote whom he may know or suspect is not entitled or duly qualified as an elector to vote at the precinct where he offers to vote. The challenge shall be communicated to the inspectors before the person is permitted to vote, by the sheriff or some other person in attendance and in charge of admission to the polling place where his right to vote must be determined as provided by sections 188 and 189 of this title.

"§ 187. Challenge of voters.—The inspectors shall select one of their number, on opening the polls, to act as challenger, and the challenger shall ascertain if each person presenting himself to vote has registered and paid all poll taxes due, such finding to be from an examination of the official list of the voters furnished by the judge of probate. If the name of the person does not appear on such list, the challenger shall challenge said voter.

"§ 355. Challenging voters.—If the name of a person desiring to vote does not appear on the official list of voters for said district, ward or precinct, as furnished by the judge of probate, it shall be the duty of the inspectors to challenge such vote in the same manner as they are required to challenge voters in general elections whose names do not appear on the official list of voters, and, when challenged, such voter, before his ballot shall be received shall be required to swear and subscribe to the same affidavit of qualification which is required of a voter challenged at a general election, and shall also be required to produce the same kind of affidavit of identification as is required of a voter challenged at a general election, and the affidavit of identification must be subscribed and sworn to in like manner as required at general elections; provided, however, that wherever a person duly qualified in a district, ward or precinct, presents to the inspectors a certificate, (dated subsequently to the date of publication by the probate judge of the list of qualified electors), signed by the probate judge, and under his seal or that of his court, that such person named appears upon the lists of qualified electors, entitled to vote at that primary, on file or record in his office, then such applicant may be allowed to vote without any challenge made upon the above ground."

It is to be noted from Section 143, supra, that any qualified elector of the precinct in which any person proposes to vote shall have the right to challenge such person's right to cast his ballot when such challenger may know or suspect he is not entitled to vote in said precinct and is not a qualified elector in the precinct wherein he offers to vote. This Section applies to primary elections as well as to general elections. (Title 17, Section 1, Code of Alabama 1940)

Sections 187, supra, and 355, supra, provide that one of the election officials at each polling place shall be designated by the inspector to act as challenger for that voting place and this person may also challenge the right of any voter to cast his ballot.

In answer to your second question, you are advised that any qualified voter may not challenge the right of other persons to cast their ballot. It is to be noted from Section 143, supra, that only a qualified elector in the precinct in which any person offers to vote may challenge the right of that person to vote. For example, a qualified elector in precinct A could not challenge the right of a person offering to vote in precinct B, as the challenger is not a qualified elector of precinct B and his right to challenge is limited to precinct A where he is a qualified elector.

In answer to your third question, you are advised that the following persons are authorized to challenge persons proposing to cast their ballots:

(1) Any qualified elector of a precinct in which any person proposes to vote.

(2) The designated election official at each voting place.
Quarterly Report of Attorney General, Vol. 18, page 273.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 2, 1948.

Hon. A. C. Cook,
Register in Chancery,
Wilcox County,
Camden, Alabama.

Register—Fees—Bonds.

The word "money," as used in Title 11, Section 27, Code of Alabama 1940, as amended by Act No. 374, General Acts 1947, page 262, includes United States Government Bonds.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of March 31, 1948, is as follows:

"Please advise me whether in the settlement of an estate a Register in Chancery can collect the same fees for handling government

bonds paid into the court as he can in handling cash paid into the court."

My answer to your question is in the affirmative.

Fees allowed to registers are set out in Title 11, Section 27, Code of Alabama 1940, as amended by Act No. 374, General Acts 1947, page 262. This section reads in pertinent part as follows:

"Registers are entitled to the following fees for the following services: * * * Commissions on sales: For the first three hundred dollars, two percent; for all over three hundred dollars, and not exceeding two thousand dollars, one and one-half percent; for all over two thousand dollars and not exceeding twenty thousand dollars, one percent; and for all over twenty thousand dollars, one fourth of one percent. For receiving, keeping and paying out or distributing money, other than that arising from sales, on the first one thousand dollars, one and one-half percent; on all over one thousand dollars and not over five thousand dollars, one percent; on all over five thousand dollars, not exceeding ten thousand dollars, one-half of one percent; and all over ten thousand dollars, one-fourth of one percent; receiving, keeping, and paying out money paid into court under a decree in favor of an administrator ad litem, one-half of one percent on the amount so received and paid out; for each notice sent by mail to creditors under articles 1 and 2 of chapter 1 of title 58 . . . .15 * * * * ." (Emphasis supplied)

The word "money" is used in the same sense in both the original section and the section, as amended. The answer to your question involves the meaning of this word as used in said section.

"The word 'money,' as used in statutes providing that a county treasurer should be liable for all moneys in his hands as such treasurer, does not mean merely coin and bank bills, but the statute must be construed in the light of commercial usage and common knowledge of business transactions. Such other construction would be extremely technical, and is uncalled for. 'Money' is a generic term, and may mean not only legal tender coin and currency, but also any other circulating medium, or any instruments or tokens in general use in the commercial world as the representative of value, and includes a certificate of deposit. Montgomery County v. Cochran, 121 F. 17, 21, 57 C. C. A. 261, citing State v. McFetridge, 54 N. W. 1, 10, 998, 84 Wis. 473, 20 L. R. A. 223." 27 Words and Phrases (Per. Ed.), page 441.

"It has been held that the term 'money' is used to designate the whole volume of the evidence of exchange recognized by the custom of merchants and the laws of the country, just as the term lands designates all real estate." **Enzor v. State**, 27 Ala. App. 60, 167 So. 336.

"Money" is defined in Black's Law Dictionary, Third Edition, page 1200, as follows:

> "Money is used in a specific and also in a general and more comprehensive sense. In its specific sense, it means what is coined or stamped by public authority, and has its determinate value fixed by governments. In its more comprehensive and general sense, it means wealth,—the representative of commodities of all kinds, of lands, and of everything that can be transferred in commerce. Paul v. Ball, 31 Tex. 10."

The Alabama Supreme Court, in **Johnson v. State,** 167 Ala. 82, 52 So. 652, 140 Am. St. Rep. 19, defines it as follows:

> " 'Money, in its strict, technical sense, is coined metal, usually gold or silver, upon which the government stamp has been impressed to indicate its value; in its more popular sense, any currency token, bank notes, or other circulating medium in general use as the representative of value; a generic term, covering everything which by consent is made to represent property, and passes as such currently from hand to hand. The word designates the whole volume of the medium of exchange, regardless of its character or denomination.'— State v. Downs, 148 Ind. 324, 47 N. E. 670, 671; Hopson v. Fountain, 5 Humph. (Tenn.) 140; Graham v. State, 5 Humph. (Tenn.) 40, 41; State v. Hill, 47 Neb. 456, 66 N. W. 541, 559; United States v. Lucius Beebe & Sons, 122 Fed. 762, 767, 58 C. C. A. 562. * * * * *."

> "We have many statutes which employ the general designation money, which in their construction, would force us to hold that the word embraces every species of lawful circulation which passes from hand to hand as money." **Noble v. State,** 59 Ala. 73, 80.

In Re Opinion of the Justices, 244 Ala. 456, 13 So. 2d 559, 561, the Court, in speaking of United States bonds, said:

> "The faith and credit of the United States is the foundation of all money values within its territory. If that is discredited, we have no financial security of any sort."

See also **Taxpayers and Citizens of Shelby County v. Shelby County et al,** 246 Ala. 192, 20 So. 2d 36.

In the case of **McGovern et al v. United States,** 272 Fed. 262, cert. den. 66 L. Ed. 1073, 25 9U. S. 580, involving a similar statute giving to the Clerk of the Circuit Court of Appeals a fee of one percent on money received, kept, and paid by him, it was held that the clerk was entitled to a fee for keeping liberty bonds deposited as surety. The Court said:

> " 'Money' is a broader and more generic term and may include not only legal tender, coin or currency, but also any other circulating

medium or instruments or tokens in general use in the commercial world as representatives of value. In Gillen v. Kimball, 34 Ohio St. 352, it was held that a bequest of all of the testator's money on deposit included a deposit of United States bonds.

"* * * We know from common knowledge that certified checks, bank drafts and post office money orders circulate in the business world as representatives of value and in satisfaction of obligations at least as freely as do legal tender coins and notes. We also take judicial notice of the fact that United States bonds are quite frequently used in a similar way. Under the order of this court by which the plaintiff in error was left at large it was immaterial whether he deposited 'cash' or any of the enumerated representatives of value which are used in the commercial world as 'money,' and the responsibility and labor of the clerk are quite as great in keeping and handling government bonds as they would be in the case of 'cash.'"

Based on the above authorities, I hold that the term "money," as used in Section 27, supra, includes United States Savings Bonds.—**Taxpayers and Citizens of Shelby County v. Shelby County et al,** 246 Ala. 192, 20 So. 2d 36.

Therefore, a register in chancery who rendered the services outlined in Section 27, as amended, supra, which involved "receiving, keeping, and paying out or distributing" United States Bonds is entitled to the same fees that he would receive for the same amount of money paid into the court.

These fees or commissions should be computed on the present cash value of the bonds rather than on their maturity value.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 5, 1948.

Hon. M. C. Sivley, Register,
Circuit Court Etowah County, In Equity,
Gadsden, Alabama.

Costs and Fees—Sheriffs—Deputy Sheriffs—Distribution and Disposition of Proceeds of Forfeited Property Sales—Title 29, Section 251, Code of Alabama 1940, as amended by Act No. 126, General Acts 1947 (Ms.), approved July 17, 1947.

Official acts of deputy sheriffs are considered those of the sheriff himself and the resulting statutory share of proceeds of forfeited property sales arising under Title 29, Section 251, Code of Alabama 1940, as amended by Act No. 126, General Acts 1947 (Ms.), approved July 17, 1947, would inure directly to the sheriff.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of February 12, 1948, was as follows:

"I shall gratefully appreciate your official opinion on the questions herein submitted.

"Proposition: A motor vehicle is condemned, ordered sold, and the proceeds of sale ordered distributed according to law under Title 29, Section 251 of the 1940 Code of Alabama as amended by Act Number 126, approved July 17, 1947.

"Question 1. The Sheriff of Etowah County, Alabama, was placed on a salary in lieu of fee basis by (Act approved September 11, 1947). Is the Sheriff or Etowah County entitled to the money under said Code section inasmuch as the Sheriff is now on a salary basis?

"2. Where the officers involved are members of the Enforcement Division of Alabama Department of Public Safety, should I make payments to said officers or to the Enforcement Division?

"3. Under said section where proof is furnished by 'A', Officer 'B' made the seizure, and Officer 'C' (the Sheriff) makes the sale under advertisement, what share will 'A', 'B' and 'C' receive under said Code section?"

Answers to the first two questions were given in an official opinion rendered you under date of March 9, 1948. It was stated in this opinion that it would be necessary for additional information to be furnished this office stating the official designation of Officer "B" in order that your third inquiry might be answered.

Under date of March 15, 1948 this office received a letter furnishing information relating to your third inquiry, which reads in part as follows:

"Officer 'B', who made the seizure, are three deputy sheriffs."

The Supreme Court of Alabama has held that the official acts of a deputy sheriff are considered those of the sheriff himself. **Rogers v. Carroll**, 111 Ala. 610, 20 So. 602; **Mosely v. Kennedy**, 245 Ala. 448, 17 So. 2d 536, and numerous cases cited therein.

This office has also held that the compensation of a deputy sheriff is a matter of contract between the sheriff and the deputy. Biennial Report of Attorney General, 1922-24, page 453.

In consideration of the above, it is my opinion that acts of deputy sheriffs under Title 29, Section 251, Code of Alabama 1940, as amended by Act No. 126, General Acts 1947 (Ms.), approved July 17, 1947, would be considered the official acts of the sheriff and the resulting share of proceeds under this code section would inure directly to the sheriff.

Any further disposition of monies so received by the sheriff would, in my opinion, be a matter strictly between the sheriff and his deputy and would depend either on the terms of the employment contract existing between them or on such discretionary disposition as the sheriff would see fit to apply.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 5, 1948.

Honorable Coma Garrett, Jr.,
Judge of Probate,
Clarke County,
Grove Hill, Alabama.

Veterans—Poll Tax—Exemptions.

The last date on which the United States was at war with any foreign state was September 2, 1945, the date on which Japan officially and formally surrendered to the Allied Powers; and, under Constitution of Alabama 1901, Section 194½, as amended by an amendment proposed by Act No. 244, General Acts 1943, page 199, and proclaimed ratified November 17, 1944, a person who has served in the military service of the United States since that date is not exempt, by reason of such service, from the payment of poll taxes.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of January 31, 1948, is as follows:

"Reference is made to Section 194½ of the Constitution of Alabama 1901, as amended by an amendment proposed by Act No. 244, General Acts 1943, page 199, and proclaimed ratified November 17, 1944.

"This amendment, in addition to exempting persons from the payment of all poll taxes who honorably served in the military service of the United States between specific dates set out therein, also exempts persons who have served, are serving, or may serve in the military service of the United States, at any time, past or

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present or fuutre, when the United States was, is, or shall be at war with any foreign state, provided such service is honorable.

"Please advise me the last date on which the United States was 'at war with any foreign state,' within the purview of said section, as amended.

"I need this information in order to determine just what persons are exempted from the payment of poll taxes by reason of having served in the military service of the United States."

Constitution of Alabama 1901, Section 194½, as amended by an amendment proposed by Act No. 244, General Acts 1943, page 199, and proclaimed ratified November 17, 1944, reads as follows:

"Section 194½. No person who honorably served in the military service of the United States between January 1, 1917 and November 11, 1918, or between September 16, 1940 and December 8, 1941, or at any time, past or present or future, when the United States was, is or shall be at war with any foreign state, shall be required after the beginning of such service to pay the poll tax specified in the Constitution of Alabama as a prerequisite to the privilege of voting in Alabama; but, on the contrary, every such person shall be exempt from the payment of all poll taxes which have theretofore accrued and have not been paid or which may thereafter accrue; Provided, however, that if any such person is discharged dishonorably from said service the exemption herein provided is forfeited, and such dishonorably discharged person, as a prerequisite to the privilege of voting in Alabama thereafter, must pay the poll tax specified in the Constitution of Alabama as if such person had never been in such service. The term 'military service' as used in this section includes service in the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, the Women's Army Auxiliary Corps, the Women's Appointed Volunteer Emergency Service, and the Women's Reserve of the United States Navy. The United States shall not be deemed at war with a foreign state within the meaning of this section at a time when an armistice exists between the United States and the foreign state. The Judge of Probate shall issue a certificate of exemption to a person exempt from the payment of poll tax by reason of this section under such rules and regulations as may be prescribed by the Governor. This section shall be self-executing and retroactive; but the Legislature is authorized to enact laws designed to carry out the purposes of this section."

It is now a matter of history that the last war in which the United States engaged was the war commonly referred to as World War II, which officially began on December 8, 1941, the day following the infamous and treacherous attack upon the United States by Japan at Pearl Harbor.

Hostilities in this war ceased on the date on which Japan officially and formally surrendered to the Allied Powers, September 2, 1945, inasmuch as all of the other enemies of the United States in that war had surrendered prior to that date.

It necessarily follows, therefore, that September 2, 1945, was the last date on which the United States was "at war with any foreign state," within the purview of Section 194½, as amended, supra. Cf.—Quarterly Report of Attorney General, Volume 42, page 32, and authorities therein cited.

(It might be inferred from the opinion above cited that August 14, 1945, rather than September 2, 1945, was the last date on which the United States was "at war with any foreign state," but such an inference would be incorrect for the reason that, while August 14, 1945, is the date on which Japan capitulated, she did not officially and formally surrender to the Allied Powers until September 2, 1945.)

The above conclusion is strengthened by the following provision contained in Section 194½, as amended, supra:

> "The United States shall not be deemed at war with a foreign state within the meaning of this section at a time when an armistice exists between the United States and the foreign state."

Since September 2, 1945, is the last date on which the United States was at war with any foreign state, it necessarily follows that a person who has served in the military service of the United States since that date is not exempt from the payment of poll taxes by reason of such service.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

April 5, 1948.

Hon. Lem J. Cobb,
Cherokee County,
Centre, Alabama.

Taxation—Exemption—Grand Lodge of the Eastern Star.

The Grand Lodge of the Eastern Star is not exempt from municipal license taxes.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of October 10, 1947, is as follows:

"We have in our town a local organization of the Eastern Star. The number of the chapter here is 418, and the chapter is duly and regularly associated with the State organization of Eastern Star. My recollection is that some years ago (perhaps 1907), the Legislature of Alabama enacted a law which exempts the Eastern Star from taxation. My further recollection is that this law especially exempts the Eastern Star from taxation on its property or income.

"Recently in our city the local chapter of Eastern Star staged a horse show. The horse show was in every respect under the management and control of the local chapter of the Eastern Star. An admission fee was charged which was admittedly reasonable, and in addition the ladies sold refreshments. From these two sources, the local chapter took in approximately $1200, which represents their income as the result of this horse show.

"In April of this year the town council of the City of Centre adopted an ordinance providing a tax of ten percent on all amusements. The City has taken the position that the local chapter of the Eastern Star should pay the city treasury ten percent of the income from this horse show, amounting roughly to about $120.

"It is my judgment that the city is in error in taking this position and that the act of the Legislature mentioned hereinabove exempts the local chapter of the Eastern Star from taxation on income just mentioned.

"I would thank you to advise me whether, under the law, the position of the city council is legally sound."

I am of the opinion that the Grand Lodge of the Eastern Star is not exempt from license taxes imposed by municipality on amusements and games.

The act to which you presumably refer in your request is Act No. 715, General Acts 1907, page 650. That act did exempt from taxation all the property, both real and personal, belonging to the Grand Lodge of the Eastern Star. However, that act was not carried forward or incorporated into the Code of Alabama 1940. Therefore, it is necessary to look to Title 51, Section 2, Code of Alabama 1940, for the statutory provision granting exemptions from taxation to property and persons. The proviso of that statutory provision which is applicable to the exemption of the Eastern Star reads as follows:

"§2. The following property and persons shall be exempt from **ad valorem taxes and none other:** * * * * All property, real and personal, used exclusively for religious worship, for schools or for **purposes purely charitable;** * * * * *" (Emphasis added).

You will notice that the above quoted statutory exemption applies only to the payment of ad valorem taxes, and none other.

The tax with which we are concerned here is not an ad valorem tax, but a municipal license tax imposed upon games and amusements in accordance with Title 37, Section 757, Code of Alabama 1940, which reads as follows:

"§757. Games, amusements; license for.—The council shall have **power to license and tax,** permit and regulate, restrain or prohibit **all kinds of amusements** and all athletic games, and the use of public parks and places of resort within the corporate limits and within the police jurisdiction of the several cities or towns, and shall prescribe the places and the manner and method of regulating and conducting all such amusements and games, and fix the time when all or any of the places referred to may be opened or shall be closed, not inconsistent with the laws of the state." (Emphasis added)

Thus, it is my conclusion that the Grand Lodge of the Eastern Star is not exempt from the municipal license tax imposed upon amusements.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 7, 1948.

Hon. A. G. Horn, Clerk,
Circuit Court,
Sumter County,
Livingston, Alabama.

Bailiffs—Compensation.

Compensation of bailiffs not affected by act of Legislature which increases compensation of jurors.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of September 25, 1947, is as follows:

"In my copy of the code that was recently mailed me I note that the last Legislature has changed the pay of jurors to $4.00 instead of $3.00 and I am at a loss to know what to do about the bailiffs.

"Will you please advise me if there will be any change in the pay of bailiffs."

Your inquiry must be answered in the negative. The act to which you presumably refer in your inquiry is Act No. 297, General Acts 1947 (Ms.), approved August 7, 1947, which act provides that the compensation of legal jurors, grand and petit, shall be increased to $4.00 per day in lieu of the $3.00 per day formerly received. This act amends Title 11, Section 98, Code of Alabama 1940. This act bears no relation to the statutory provision which provides for the compensation of bailiffs.

The statute relative to the duties and compensation of bailiffs is Title 13, Section 187, Code of Alabama 1940, and was likewise amended by the 1947 Legislature by Act No. 257, General Acts 1947 (Ms.), approved July 31, 1947. However, under the provisions of that act the compensation of bailiffs in counties, other than those specifically excepted therefrom, remains $3.00 per day.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 7, 1948.

Hon. L. W. Snellgrove,
Clerk, City of Ozark,
Dale County,
Ozark, Alabama.

Municipal Corporations—Licenses.

An out of state farmer selling in a city of Alabama farm products produced by him is exempt from the payment of municipal license.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of October 16, 1947, is as follows:

"Will you please give your ruling on whether we can charge a fruit seller from another state license to sell farming products on our streets here or not?

"We know we cannot charge anyone selling what they raise or make on their farms here in Alabama, but does that apply also to farmers in other states?"

I am of the opinion that your city cannot charge a license or fee against a farmer who sells in your city farm products that he produced out of the State of Alabama.

Title 37, Section 758, Code of Alabama 1940, is determinative of this question, and this statutory provision reads as follows:

"§758. No license for farm products charged to farmers.—It shall be unlawful for any municipality to charge the farmers or others engaged in the production of farm products of whatever nature, any license or fee, for the sale or other disposition of said articles produced by them, **at any place.**" (Emphasis added)

You will note that the above statutory exemption applies to farmers as a class without any qualification upon the place where the farmer produces such products. In fact, the statute expressly states that the place where such farm products are produced is immaterial. Cf. Quarterly Report of Attorney General, Vol. 37, page 62.

However, a word of caution should be added in that this exemption applies only to a farmer who is selling farm products which were produced by him.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 7, 1948.

Hon. Phillip Hamm,
Commissioner of Revenue,
State Department of Revenue,
CAPITOL.

1. The owner of two cotton warehouses located on opposite sides of the street and in no way connected with each other is liable for a license, both county and state, under Title 51, Section 500, Code of Alabama 1940, and Title 51, Section 831(b), Code of Alabama 1940, as amended by Act No. 546, General Acts 1943, page 535, approved July 10, 1943.

2. The owner of several cotton warehouses, although all are located on the property of the owner, where the warehouses are not connected with each other in any way and all are separated at a distance, is liable for a separate license, both county and state, for each individual warehouse under Title 51, Section 500,

Code of Alabama 1940, and Title 51, Section 831(b), Code of Alabama 1940, as amended by Act No. 546, General Acts 1943, page 535, approved July 10, 1943.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion, bearing date of February 27, 1948, is as follows:

"Will you please render me an official opinion with respect to the following facts:

"(1) A cotton warehouse is operating within the corporate limits of a city and is owned by an individual who also owns and operates another cotton warehouse within the same city and on the same street but upon opposite sides of the street. These two warehouses are located approximately one city block apart. There is no runway or causeway connecting these two warehouses. Frequently the owner will transfer cotton from one of these warehouses to the other, but this must be done by passing through the public street of the city.

"Is the owner of these two warehouses liable for one license or two licenses for the operation of such warehouses. It has been a practice in some instances for Probate Judges to issue one license under Section 500, Title 51, Code of Alabama 1940 for all of the warehouse operations by one individual although more than one warehouse was involved. It appears to me that Sections 831 as amended and 836, Title 51, Code of Alabama 1940 require a license for each warehouse.

"(2) Another method of operation is that an individual will own and operate two or more distinct warehouses which are all located on property of the owner and are separated by a few hundred feet for fire protection. Cotton is frequently transferred from one of these warehouses to the other and the transfer takes place on property of the owner. In this type of operation, is the owner liable under Section 500, supra, for a single cotton warehouse license based upon the storage of all of these warehouses, or is he liable for a separate license for each individual warehouse?

"(3) In the event that you hold that under paragraph 1 and 2 the owner is liable for more than one warehouse license, please inform me whether or not the owner is required to procure only one state license, or must he procure a state license for each warehouse?" Title 51, Section 500, Code of Alabama 1940, provides:

"Cotton warehouses.—Each person operating a warehouse or yard for the storage of cotton for compensation shall pay a license tax to

the state as follows: Every such warehouse storing not more than five thousand bales in the preceding calendar year, twenty dollars; more than five thousand and not more than ten thousand bales, forty dollars; more than ten thousand and not more than fifteen thousand bales, sixty dollars; more than fifteen thousand and not more than twenty thousand bales, one hundred dollars; more than twenty thousand and not more than thirty thousand bales, one hundred fifty dollars; more than thirty thousand bales, two hundred dollars."

Title 51, Section 831, Code of Alabama 1940, as amended, provides in part as follows:

"License, procurement of; form of license.—Before any person, firm, or corporation shall engage in or carry on any business or do any act for which a license by law is required, he, they, or it, except as otherwise provided, shall pay to the judge of probate of the county in which it is proposed to engage in or carry on such business or do such act, or to the commissioner of licenses or the state department of revenue, as specifically the amount required for such license, and shall comply with all the other requirements of this title; and upon the payment of such amount and a fee of fifty cents herein provided, for the issuance of such license and all costs and fees and penalties which shall have accrued, or which such person, firm or corporation shall have become liable in any proceedings commenced for the collection of such license, or to enforce payment thereof, such probate judge, commissioner of licenses or department of revenue shall issue the license properly countersigned, in the form and on the blank to be furnished by the comptroller, which shall set forth and specify the name of the person, firm or corporation applying therefor, the business or act which it is proposed to carry on or do thereunder, the name of the street or location, where it is proposed to carry on the same, if such location shall be in a city or town and have a street number, and if not, then the location and amount paid for such license, and the time for which it is issued; * * * * *. (b) There is hereby levied for the use and benefit of and to be paid to the county in which the license is issued, in addition to all license taxes levied under the provisions of article 1 of chapter 20, for state purposes and which are payable to the judge of probate or commissioner of licenses, a sum equal to fifty per cent of the amount levied for state purposes, except as otherwise specifically provided."

Title 51, Section 836, Code of Alabama 1940, provides:

"License to designate place of business.—Every license granting authority to engage in or exercise any business, employment, or profession, unless expressly authorized elsewhere or otherwise, shall designate the place of such business, employment or profession at some specified house or other definite place within the county of the probate judge granting it. Engaging in or exercising any such license, business, employment, or profession elsewhere than at such

house or definite place, unless expressly authorized elsewhere or otherwise by law, shall be held to be without license. A license which does not specify such house or definite place where business, employment or profession is limited thereto by law, shall be void."

In an opinion of this office reported in Biennial Report of Attorney General, October 1, 1936-September 30, 1938, page 515, it is stated:

"Answering your inquiry as to whether the DeKalb Amusement Company, under the provisions of Section 96 of license schedule as contained in General Acts of the Legislature, Regular Session 1935, page 482, should procure license for each of two theatres, the DeKalb Theatre and the Strand Theatre, which are operated in separate houses or places in the City of Fort Payne, Alabama, or should be permitted to operate both of the same under one license, you are advised that, in my opinion, a separate license should be procured for each of said theatres, or motion picture shows."

And in the case of **Jebeles et al. v. State,** 117 Ala. 174, 23 So. 676, the question under consideration by the Supreme Court of Alabama was whether or not a person engaging in the business of selling cigarettes at two separate and distinct places in the City of Anniston should be required to procure license for that purpose for each of said places of business, and in said case, the Supreme Court said:

"It seems very clear that under this license, the appellants could not carry on the business authorized in more than one place in the city. If so, the purpose of the statute, which was to raise revenue,—and, in so far as it gives the better supervision over the dealers by police authorities,—might be largely defeated. If they might sell in two places as claimed, they might sell in an indefinite number of places. In analogous cases of dealers in intoxicating liquors, licensed to sell in a given town, it has been held, that they cannot carry on the business at more than one place * * * *.

"And in **Hochstadler v. State,** 73 Ala. 24, it was held, that only one license is required of a person engaged in retailing spirituous liquors, who occupies and carries on his business in two adjacent rooms connected with each other by an open entrance or archway cut in the partition wall, in each of which is a bar, one of the rooms being used for white persons and the other for negroes, and both rooms constituting but one establishment and being under one management.

"If the two rooms had not been thus connected, but had been separated at a distance, as in the cases before us, it is plainly inferable, it would not have been held that one license would cover and protect the two."

In view of the above-quoted sections of Title 51, Code of Alabama 1940, the Attorney General Report, and the case cited, your inquiries as stated above are answered as follows:

1. The owner of the two warehouses situated as indicated in (1) above is liable for a license, both county and state, for the operation of each warehouse.

2. The owner of several warehouses, although all are located on the property of the owner, where the warehouses are not connected with each other in any way and are separated at a distance, is liable for a separate license, both county and state, for each individual warehouse.

3. Your inquiry number three is answered by 1 and 2 above; that is, the owner of several warehouses as described must procure a state and county license for each warehouse.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 8, 1948.

Honorable C. E. Corprew, Sheriff,
Tallapoosa County,
Dadeville, Alabama.

Tallapoosa County—Sheriffs—Chief Deputy and Deputies.

Under Act No. 455, Local Acts 1931, page 225, as amended by Act No. 24, Local Acts 1943, page 15, the Sheriff of Tallapoosa County must have a deputy sheriff located at each of the following places: Alexander City, Dadeville, Daviston and East Tallassee, whose salary is fixed in said act, as amended, and is payable out of the general fund of the county; and, under Title 54, Section 3, Code of Alabama 1940, as amended by Act No. 81, General Acts 1943, page 86, he must also have a chief deputy, whose salary is fixed by the county governing body of Tallapoosa County within the salary range contained in said section, as amended, and is payable out of the general fund of the county.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of September 22, 1947, is as follows:

"I am in receipt of your opinion, dated September 10, 1947, holding that Act No. 94, Local Acts 1947, approved July 7, 1947, fixing the salary of the Chief Deputy Sheriff of Tallapoosa County, Alabama, is unconstitutional in that it violates the Constitution of Alabama 1901, Section 105.

"Inasmuch as this Act is unconstitutional, I presume that Act No. 455, Local Acts 1931, page 225, as amended by Act No. 24, Local Acts 1943, page 15, is still in full force and effect. This Act, as amended, authorizes and requires the sheriff to appoint and maintain regular deputy sheriffs at Alexander City, Dadeville, Daviston, and East Tallassee; prescribes the salaries of such deputies; and provides for the payment of the same out of the general fund of Tallapoosa County.

"Title 54, Section 3, Code of Alabama 1940, as amended by Act No. 81, General Acts 1943, page 86, provides that in all counties of the State of Alabama in which the sheriff is not on a salary basis (and I am not on a salary basis), the sheriff must have one chief deputy, whose salary shall be fixed by the county governing body at 'not less than nine hundred and not more than twenty-four hundred dollars.'

"Premises considered, I desire your official opinion as to whether or not I, as Sheriff of Tallapoosa County, must have four deputy sheriffs as provided in Act No. 455, as amended, supra, and in addition thereto must have a chief deputy as required by Title 54, Section 3, as amended, supra, whose salary, to be fixed by the county governing body of Tallapoosa County within the salary range contained in said section, as amended, shall be paid out of the general fund of the county."

You are correct in your assumption that, inasmuch as Act No. 94, Local Acts 1947, page 66, is unconstitutional (Quarterly Report of Attorney General, Volume 48, page 173), Act No. 455, Local Acts 1931, page 225, as amended by Act No. 24, Local Acts 1943, page 15, is still in full force and effect. This act, as amended, authorizes and requires the Sheriff of Tallapoosa County to appoint and maintain a deputy sheriff at each of the following places in the county: Alexander City, Dadeville, Daviston and East Tallassee. The salary of each of these deputies is fixed in said act, as amended, and is payable out of the general fund of the county.

Title 54, Section 3, Code of Alabama 1940, as amended by Act No. 81, General Acts 1943, page 86, provides:

"Deputies.—In all counties of the State of Alabama in which the sheriff is not on a salary basis under and by virtue of a constitutional amendment, the sheriff of such county must have one chief deputy, and may have as many other deputies as he may think

proper, but the coroner of such county shall not be appointed a deputy. Said chief deputy shall be appointed by the sheriff of the county to hold office at the pleasure of the sheriff, and for his services shall receive a salary of such amount as may be fixed by the court of county commissioners, board of revenue or other governing body of the county in which said chief deputy is appointed not less than nine hundred and not more than twenty-four hundred dollars, payable in twelve equal monthly installments out of the treasury of the county upon the warrant of the board of revenue or court of county commissioners of such county. In St. Clair county the salary of the chief deputy may be fixed at an amount not to exceed twenty-four hundred dollars per annum."

Inasmuch as you are not on a salary basis, this section, as amended, is applicable to Tallapoosa County; and, under it, you must have a chief deputy, whose salary shall be fixed by the county governing body of the county at "not less than nine hundred and not more than twenty-four hundred dollars," payable out of the general fund of the county.

In this connection, it should be noted that none of the deputies provided for in Act No. 455, as amended, supra, is a chief deputy.

Specifically answering your inquiry, you are advised that, under Act No. 455, as amended, supra, you must have a deputy at each of the following places in the county: Alexander City, Dadeville, Daviston and East Tallassee, whose salary is fixed in said act, as amended, supra, and is payable out of the general fund of the county; and that, under Title 54, Section 3, as amended, supra, you must also have a chief deputy, whose salary shall be fixed by the county governing body of the county within the salary range contained in said section, as amended, and is payable out of the general fund of the county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 14, 1948.

Hon. G. H. Howard,
Probate Judge of Elmore County,
Wetumpka, Alabama.

Elections—Election Officials. Title 17, Section 349, Code of Alabama 1940.

1. Nominations of election officials to serve in any party primary election should be made by the county executive committee of the party concerned, rather than by any individual member thereof, to the appointing board provided by law for the appointment of election officials.

2. A member of the county executive committee, if not a candidate for nomination to office, is eligible to serve in such capacity and participate in the nomination of election officials for his party primary election, even though such committeeman may be interested in some manner in the outcome of the election.

3. In a primary election, if the county executive committee of the party submits a list of names to the appointing board for appointment as officers to conduct the primary election, the appointing board must, if there be on said list the names of sufficient persons who are legally eligible, select and appoint the officers to conduct the primary election from the list so presented to it, the appointing board designating the particular duties each of such persons are to perform in the conduct of the election.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of April 6, 1948, is as follows:

"Title 17, Section 349 of the Code of Ala., provides that any candidate may submit to the executive committee names of suggested election officers to represent him at the polls, and that the committee as nearly as practicable must provide him with such officers.

"Please advise me if it is proper under this section to allow the committeeman from one beat to select the officers for that beat, especially where this committeeman is an employee of one of the candidates; or should the whole committee pass on them. Where a committeeman from one beat is an employee of one of the candidates, and would lose his job unless that candidate wins, that is where he is the road foreman for a candidate for a Commissioner, should this committeeman be allowed to select all the election officers from his beat? Should such committeeman, road foreman for a candidate commissioner, even vote when selecting election officers for his beat?

"Certainly the spirit of fairness indicated by our election laws would prevent such a gross injustice. Indicative of the intention of our laws, I refer you to sections 6, 122, 326 and 331, Title 17, Code of Alabama.

"Please let me have an answer to this within one week, if possible.

"Please advise me your opinion also on this question. Should the County Committee designate which election officers should be

managers, clerks and returning officers, or should they merely name the six officers and leave to the appointing board to designate whether they should be managers, clerks and returning officers?"

Title 17, Section 349, Code of Alabama 1940, referred to in your request for an opinion, provides, in pertinent part, as follows:

"Each candidate for nomination may at least twenty-five days before the primary, present to the county executive committee of his party a list of election officers desired by him for any one or more of the districts, wards or precincts; and his county committee shall, so far as practicable, make up, from the list so presented to it, a list of names of election officers, six in number, for each district, ward or precinct, which it will nominate to the appointing board of the county for appointment as officers to conduct the primary election and the county committee shall present the list so made up by it to the appointing board of the county, which appoints the election officers to conduct elections for state and county officers in November, or at any other lawful time, which appointing board from the list so presented to it by the county committee shall if there be on said list the names of sufficient persons who are legally eligible select and appoint the officers to conduct the primary election, * * * *."

It is my interpretation of such statute that it provides that each candidate for nomination participating in any party primary may submit to the county executive committee of his party a suggested list of election officials for each precinct, district, ward, or other subdivision of the county, and that the county executive committee shall so far as practicable from such lists, prepare and present to the appointing board of the county the list of election officials nominated by the party for appointment as election officials for the particular election and party concerned. It has likewise been held by this office that if the list of election officials submitted to the appointing board by the county executive committee of the party concerned contains the names of sufficient persons who are legally eligible for appointment as election officials, the appointing board must select and appoint those persons so nominated to conduct the primary election.—Quarterly Report of Attorney General, Vol. 18, p. 177, and Quarterly Report of Attorney General, Vol. 43, p. 7.

It is, therefore, my opinion that the purpose and effect of the above statute is to vest in the county executive committee as a whole, or any duly authorized and appointed sub-committee, rather than any one individual member thereof, the power and authority to nominate to the appointing board of the county the names of those persons designated as officials to conduct the election in question. The procedure mentioned by you, in your request, of permitting the individual committeeman for each beat to select and nominate all election officials for such beat, or precinct, in my judgment, is not in keeping with the provisions, spirit and intent of Section 349, supra.

However, I should point out, in answer to the second portion of your first inquiry, that I find no provision of law preventing a member of the county executive committee from serving upon such committee and exercising the powers and performing the duties imposed upon him by law solely because such committee member might be interested directly, or indirectly, in the outcome of such election. In Quarterly Report of Attorney General, Vol. 19, p. 97, it was stated that the whole tenor of the election laws of the State is against persons who are candidates for nomination or election in any election, either general or primary, having anything whatever to do with the holding or conduct of such election. However, such prohibition runs against those persons who are candidates for nomination only and, in my judgment, does not extend to those persons, other than candidates, who might be directly or indirectly interested in the outcome of such election. It is, therefore, my judgment that a member of the county executive committee, if not a candidate for nomination to office, would still be eligible to serve in such capacity and participate in the nomination of election officials for the primary election even though such committeeman be interested in some manner in the outcome of the election.

In answer to your second inquiry, reference is again made to the above quoted portion of Section 349, supra. It is my opinion that it was the legislative intent to lodge some discretion both in the executive committee and in the appointing board of the county. The discretion lodged in the executive committee is to make selections from the lists furnished by candidates, selecting, so far as practicable from such lists, six names to be nominated as election officials. These six names are to be reported by the county executive committee to the appointing board of the county, and from these six names the appointing board shall name the different officers to serve at any given box or precinct.

It is evident that it was intended to lodge some discretion in the appointing board of the county, since the word "select" is used with reference to the action of the appointing board in dealing with the list of six presented to it by the executive committee of the county. Since all must be appointed, the only selection that could be made by the appointing board would be selecting the one to hold each separate office. In other words, the county executive committee takes all of the names furnished by all the candidates, and from those it selects six names to be submitted to the appointing board. From these six names, the appointing board selects and appoints the officials to fill each of the offices for election purposes, i. e., clerks, inspectors and returning officers.

This is the only construction that I am able to place upon Section 349, supra, which would give meaning to each and every part of said section.

It is, therefore, my opinion that the appointing board, although required by law to name as election officials those persons whose names have been submitted to them by the county executive committee, may

designate the particular duties each of such persons are to perform in the conduct of the election. Cf. Quarterly Report of Attorney General, Vol. 18, p. 177, and Quarterly Report of Attorney General, Vol. 43, p. 7, supra.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

April 15, 1948.

Miss Loula Dunn, Commissioner,
Department of Public Welfare,
421 South Union Street,
Montgomery 5, Alabama.

Employees' Retirement System—Employees.

Act No. 607, General Acts 1947, page 456, approved October 9, 1947, by its express terms, applies only to State employees and does not apply to county employees.

Opinion by Assistant Attorney General Sykes.

Dear Miss Dunn:

Your request for an official opinion bearing date of March 30, 1948, is as follows:

"I am writing with reference to Act. 607 passed by the 1947 Legislature and Section 12 of Act 515 passed by the 1945 Legislature. Is it permissible under these two acts for an employer of persons who are participating as members of the Employees' Retirement System of Alabama under provisions of Section 12 of Act 515 to provide out of funds available to such employer a supplementary retirement benefit as defined in Act 607. In other words, is it possible under the present statutes for the plan for supplementary retirement benefits to be extended to employees of county departments of public welfare who are participating members of the Alabama Employees' Retirement System.

"We shall appreciate immediate advice from you on this question."

In my opinion, Act No. 607, General Acts 1947, page 456, approved October 9, 1947, which provides a plan for a supplementary retirement allowance for certain State employees, by its express terms, is limited

to State employees. The Act, therefore, cannot be interpreted as applying to county employees.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

April 15, 1948.

Hon. A. C. Cook,
Circuit Clerk,
Wilcox County,
Camden, Alabama.

Fine and Forfeiture Fund—Clerks—Costs and Fees—Sentences.

When a defendant is convicted for a misdemeanor and sentenced to imprisonment in the county jail, the clerk may claim his fees from the fine and forfeiture fund of the county, provided there is a judgment for costs against the defendant and execution has been issued and returned no property found. Title 15, Section 393, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of March 23, 1948, is as follows:

"Will you please advise me if I can go to the Fine and Forfeiture Fund or General Fund for my fees in cases where the defendant pleads guilty for an offense and the Circuit Judge, as a punishment for said offense, imposes a jail sentence on said defendant.

"As follows:

"(The Defendant enters a plea of guilty to Forgery in the 3rd degree as charged in the indictment and is accordingly adjudged to be guilty and as punishment for said offense is sentenced to the County jail of Wilcox County for one (1) year.)

W. E. Callen
Judge

"If I cannot go to the Fine and Forfeiture Fund or General Fund, where does a Clerk get his fees in such cases?"

You are advised that, under the facts stated in your inquiry, you may collect your fees from the fine and forfeiture fund, provided a judgment

is entered taxing costs against the defendant and execution is issued and returned no property found. See Title 15, Section 393, Code of Alabama 1940; Quarterly Report of Attorney General, Vol. 10, page 54.

Third degree forgery is a misdemeanor. Title 14, Section 207, Code of Alabama 1940; Title 1, Section 7, Code of Alabama 1940.

In the case outlined by your inquiry, the defendant was sentenced to imprisonment and not to hard labor for the county. There is apparently no sentence or judgment for costs against defendant.

Under such circumstances, the defendant not being sentenced to hard labor, the costs cannot be paid under Title 11, Section 83, Subsection (e), Code of Alabama 1940. The clerk's costs can be paid from the fine and forfeiture fund of the county under the provisions of Title 15, Section 393, Code of Alabama 1940, which provides for the payment of fees of officers of the court arising from criminal cases "in which defendants have been convicted and have been proved insolvent by the return of executions 'no property,' . . ." It is necessary, however, that judgment be entered for costs before an execution can issue. Biennial Report of Attorney General, 1934-36, pages 176, 177. When there is no judgment for costs, the defendant may be properly sentenced for costs. **Meinhardt v. State**, 22 Ala. App. 263, 114 So. 631.

Therefore, if the judgment in this case is amended by the court resentencing the defendant to pay costs, and if execution is issued against defendant and is returned no property found, you will then have a claim against the fine and forfeiture fund for the clerk's fees under the provisions of Title 15, Section 393, Code of Alabama 1940.

My attention has not been called to any local law touching this matter, and no local law was considered in this opinion.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

April 16, 1948.

Hon. C. A. Rutherford,
Chairman, Board of Registrars,
Chilton County,
Route 1,
Clanton, Alabama.

Boards of Registrars—Compensation—

Act No. 531, General Acts 1947, page 388.

A member of the county board of registrars is only entitled to be paid for each day actually served in attendance upon legal

sessions of the board, and is entitled to no compensation for those days upon which such member does not attend such sessions of the board, irrespective of what may be the cause of such absence.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of January 23, 1948, is as follows:

"We the members of the Board of Registrars of Chilton County would like to get your opinion on the following questions: If a member of the Board of Registrars is unavoidably absent from the meeting of the Board does he lose the time."

As I interpret your question, you inquire as to whether a member of the county board of registrars, unavoidably absent from any session of the board, may be compensated for the period during which he was so absent.

In my opinion, he may not.

The compensation of the members of the county boards of registrars is provided for by Act No. 531, General Acts 1947, page 388, which act supersedes Title 17, Section 24, Code of Alabama 1940, and provides as follows:

"That in all counties in the State of Alabama each registrar shall receive $7.50 per day, to be paid by the State and disbursed by the several Judges of Probate for each day's attendance upon the sessions of the board."

The provisions of this act, in my opinion, clearly indicate that the compensation to be received by a member of the county board of registrars is based upon the number of days such member was in attendance while the board was in legal session. The compensation of members of boards of registrars is fixed upon a per diem basis and becomes due and payable only for the days actually served. Quarterly Report of Attorney General, Vol. 24, page 162.

It is, therefore, my opinion that a member of the board of registrars is only entitled to be paid for each day actually served in attendance upon legal sessions of the board, and is entitled to no compensation for those days upon which such member does not attend such sessions of the board, irrespective of what may be the cause of such absence.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 16, 1948.

Hon. James E. Folsom,
Governor of Alabama,
CAPITOL.

Plumbers—Boards—Vacancies.

1. When a member of the Board of Plumbers Examination and Registration of Alabama, appointed to represent journeyman plumbers, becomes licensed as a master plumber, he vacates his office on said board.

2. The Governor should appoint a person to fill any vacancy occurring on such board from a list of two names per vacancy submitted by the same source which should have submitted the list in the case of the original appointments, and the same is true as to the appointment of a person for a full term.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of February 16, 1946, is as follows:

"An important question has come up with reference to Title 62, Sections 116 and 119, on which your opinion is desired.

"Question 1. Section 116 provides for four members composed of master plumbers, as defined by this subdivision, and four members shall be journeyman plumbers, as defined by this subdivision. Therefore, should a member of the board, who, when appointed as a journeyman plumber, as defined by said subdivision, later becomes a master plumber by operation of law, would his membership on the board become vacated immediately?

"Question 2. In the event the above question is answered in the affirmative, can the Master Plumbers' Association and/or the Journeyman Plumbers' Association of the cities involved in this title submit to the Governor, in writing, the required number of names for his consideration in selecting the membership on the said board?

"Question 3. In the event Question #2 is answered in the negative, then who will submit the names from which the Governor will make the appointments?"

I am of the opinion that your first question should be answered in the affirmative.

A careful reading of Title 62, Article 17, Sections 115-128, Code of Alabama 1940, applicable only to Jefferson, Mobile, and Montgomery Coun-

ties, shows that the intention of the legislature was to provide for the licensing and control, for the benefit of the public, of the plumbing trade in the above mentioned counties. Plumbers are composed of two classes; namely, master plumbers and journeyman plumbers.

Title 62, Section 119, Code of Alabama 1940, defines journeyman and master plumbers as follows:

> "* * * * A 'journeyman plumber' within the meaning and for the purpose of this subdivision shall be held to mean and to include any person other than a master plumber, who, as his principal occupation, is learned in the actual, practical, physical installation of plumbing as a handicraft or trade. A 'master plumber' within the meaning and for the purposes of this subdivision shall be held to mean and to include any person, firm or corporation engaged in or proposing to engage in the business of contracting to do or superintending the installation of plumbing, either or both; but if such applicant for registration be an individual, he must either qualify himself to be a licensed master plumber or must continually keep in his active employ a duly registered and licensed master plumber; and if such licensee be a firm or corporation, at least one active member of such firm or corporation must be a duly registered master plumber, actively continuously connected with the conduct of said business."

From the definitions quoted from Section 119, supra, the diversity of interests of the two classes is clearly indicated. The master plumber will be seen to be "any person, firm or corporation engaged in or proposing to engage in the business of contracting to do or superintending the installation of plumbing, either or both;"—in other words, a member of management, an employer or self employed person, firm or corporation. On the other hand, a journeyman plumber is seen to be "any person other than a master plumber" who is engaged in the plumbing trade; namely, an employee.

The legislature saw fit to further distinguish the two classes by providing that only skilled plumbers may become licensed master plumbers; while practical plumbers are confined to the journeyman class by Title 62, Section 126, Code of Alabama 1940, which reads in pertinent part:

> "Each and every applicant for registration and license as a master plumber shall be examined by the board as to his knowledge and skill in supervising, controlling, doing or performing plumbing in a sufficient number of questions to thoroughly test his knowledge and fitness to be a registered and licensed as a master plumber. Each and every applicant for registration and license as a journeyman plumber shall be examined by the board in a sufficient number of questions to thoroughly test his knowledge and fitness to do practical plumbing work, and in addition thereto, the board may require such

applicant as journeyman plumber to do and perform such actual practical physical tests as shall be deemed by the board expedient. * * * *."

Having recognized the divergent interests and skills of the two classes, the legislature provided that they should be governed by a board composed of an equal number from each class (four master plumbers and four journeyman plumbers), plus one member engaged in public health work in Alabama. Title 62, Section 116, Code of Alabama 1940, which sets up the board, is as follows:

"There shall be a board to be known as a board of plumbers examination and registration of Alabama. Said board shall consist of nine members who shall be appointed by the governor of Alabama. Four of said members shall be master plumbers as defined by this subdivision; four shall be journeyman plumbers as defined by this subdivision; and one shall be a duly qualified health officer of Alabama or of some political subdivision thereof, or of a sanitary or civil engineer engaged in the public health work in Alabama. There shall be a list submitted to the governor containing the names of eight licensed master plumbers, eight journeyman plumbers and a list of two health officers or sanitary or civil engineers submitted by the state board of health and the governor shall appoint the members of the board from said lists."

That the legislature saw fit to further safeguard the interests of each class by maintaining the balance between them on the board at all times may be seen from Title 62, Section 117, Code of Alabama 1940, wherein it was provided that the initial appointments should be so made that equal numbers from each class would be appointed for equal initial terms, thus assuring representation of equal experience for each class. The pertinent part of this section is as follows:

"* * * * Of the first appointee hereunder two journeyman plumber and two master plumber shall be appointed for a term of two years, two journeyman plumber and two master plumber for a term of three years and the remaining member for a term of four years."

Therefore, since it was the intention of the legislature to provide equal representation for each class on the board, when a member of that body appointed to represent one class becomes a member of the other class, he vacates his office on the board by virtue of being no longer a member of, nor qualified to represent, the class from which he was appointed. His continuance on the board would upset the balance provided by the legislature, and, therefore, would be untenable.

Speaking of a similar statute, the Supreme Court said: "A licensee may not enjoy the benefits or privileges conferred by the act without also bearing the burdens and inconveniences imposed by it." **Lehmann v. State Board of Public Accountancy, et al,** 208 Ala. 185, 94 So. 94.

Since the answer given to your first question necessarily indicates a vacancy on the board, we come now to the question: Who shall submit a list to the Governor from which an appointment to fill the vacancy shall be made?

The statutory provisions applicable to this question are portions of Sections 116 and 117, supra, which read, respectively, as follows:

> "* * * * There shall be a list submitted to the governor containing the names of eight licensed master plumbers, eight journeyman plumbers and a list of two health officers or sanitary or civil engineers submitted by the state board of health and the governor shall appoint the members of the board from said lists." (Emphasis supplied.)

> "* * * * An unexpired term of any member of said board caused by death, resignation or otherwise shall be filled by appointment of the governor of Alabama. * * *."

Admittedly, they are not clear, and their legislative history does not throw any light on the subject. Consequently, it becomes necessary to ascertain the legislative intent by resort to established rules of statutory construction.

I am of the opinion that a proper interpretation of the quoted part of Section 116, supra, is that the original appointments to this board (four licensed master plumbers, four journeyman plumbers, and one health officer or sanitary or civil engineer) should have been made by the Governor from a list of eight licensed master plumbers, a list of eight journeyman plumbers, and a list of two health officers or sanitary or civil engineers. In other words, it is my opinion that it provided for the submission of three separate lists. This construction is strengthened by the use of the plural word "lists" in the last clause of the sentence quoted. It is perfectly clear from this part of Section 116, supra, that the list of two health officers or sanitary or civil engineers should have been submitted by the State Board of Health. No doubt, the reason for this was a recognition by the legislature of the fact that persons engaged in the plumbing trade have an important bearing on the health of the community. On the contrary, it is not clear who should have submitted the list of licensed master plumbers or who should have submitted the list of journeyman plumbers. However, in view of the recognition by the legislature of the fact that there are two classes of plumbers, with diversity of interests, and the careful effort on the part of the legislature to provide equal representation for each class on the governing board, in order to insure that the interests of each class would be safeguarded, I am of the opinion that the list of licensed master plumbers should have been submitted by that class, preferably through an association or organization of members of that class, if there be such an association or organization. Likewise, I am of the opinion that the list of journeyman plumbers should have been submitted by that class, preferably through an association or organization of members of that class, if there be such an association or organization.

Construing Sections 116 and 117, supra, together, in the light of the construction hereinabove placed on the above quoted portion of Section 116, it is my opinion that the Governor should appoint a person to fill any vacancy on the board from a list of two names per vacancy submitted to him by the same source which should have submitted the list in the case of the original appointments. The same would be true as to the appointment of a person for a full term. In other words, if a licensed master plumber is to be appointed, the list of two names per vacancy should be submitted to the Governor by the licensed master plumbers, preferably through an association or organization of licensed master plumbers, if there be such an association or organization; if a journeyman plumber is to be appointed, the list of two names per vacancy should be submitted to the Governor by the journeyman plumbers, preferably through an association or organization of journeyman plumbers; and if a health officer or sanitary or civil engineer is to be appointed, the list of two names per vacancy should be submitted by the State Board of Health.

I am convinced that this conclusion is in accord with the intention of the legislature, ascertained through well known principles of statutory construction.

Statutes should be construed according to the manifest purpose and intention of the lawmakers, and such purpose should not be defeated by a narrow construction based upon nice distinctions in the meaning of words. **Thomason v. Court of County Commissioners,** 184 Ala. 28, 63 So. 87.

In ascertaining a dubious legislative intent, great weight will be given to the practical effect which a proposed construction of a statute will have. **Worthen v. State,** 189 Ala. 395, 66 So. 686.

A literal interpretation will not be adopted when it would defeat the purpose of a statute, if any other reasonable construction can be given to the words. **Harrington v. State,** 200 Ala. 480, 76 So. 422.

A statute, the meaning of which is doubtful, should be given a rational and sensible construction. **Shepherd v. Clements,** 224 Ala. 1, 141 So. 255.

The fundamental rule of construction is to ascertain and give effect to the intention of the legislature as expressed in the statute. **Street v. Cloe,** 207 Ala. 631, 93 So. 591.

All particular rules for construing statutes must be regarded as subservient to the end of determining the legislative intent. **Middleton v. General Water Works & Electric Corporation,** 25 Ala. App. 455, 149 So. 351, certiorari denied 227 Ala. 219, 149 So. 352.

My answer to your second question makes it unnecessary to consider your third question.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 16, 1948.

Hon. Ernest C. Towry,
Circuit Clerk,
Twenty-Third Judicial Circuit,
Huntsville, Alabama.

Intoxicating Liquors—Informer's Fees.

When several persons are convicted for possessing a still or apparatus, and the evidence shows that the still or apparatus is the same in reference to both persons convicted, and the conviction is under the provisions of Title 29, Section 131, Code of Alabama 1940, the informer may be paid only one fee of $25.00 under the provisions of Title 29, Section 134, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of March 20, 1948, is as follows:

"Three men were caught at a still and were jointly indicted by the Grand Jury for possession of a still, under Title 29, Section 131 of the 1940 Code of Alabama. All three entered a plea of guilty.

"After reading your opinion of December 6, 1938, Report of Attorney General, Quarterly Report October-December, 1938, page 102, the Sheriff insists that he is entitled to a $25.00 informer fee for each defendant. Section 134 of Title 29 seems to provide that only one such fee shall be paid for a conviction of any number of persons more than one for a violation of Section 131 of Title 29 where the evidence shows that the still, apparatus, or appliance is one and the same. Should I collect only one $25.00 distilling fee in the matter?"

You are advised that you should collect for the sheriff only one $25.00 informer's fee under the provisions of Title 29, Section 134, Code of Alabama 1940, even though three persons were convicted.

Title 29, Section 134, Code of Alabama 1940, provides as follows:

"§ 134. Twenty-five dollar fee to sheriff charged in bill of costs on conviction.—When any person is convicted of violating the provisions of sections 131 and 132 of this title, there shall be charged in the bill of cost the sum of twenty-five dollars, to be allowed the person who furnished the evidence and brought about the conviction of any person or persons for the violation of the said referred to statutes. The person so claiming said sum shall satisfy the presiding judge that he is the person entitled to same, and shall receive

from the judge a certificate to that effect, and such person may be the sheriff of the county, deputy, or any other person furnishing the evidence necessary for conviction. **Provided however, that only one such amount shall be paid under this section for a conviction of any number of persons, more than one, for a violation of either of said referred to sections where the evidence shows that the still, apparatus or appliance, is one and the same."** (Emphasis supplied.)

In my opinion, the case stated in your inquiry falls squarely under the proviso above underscored, which clearly states that only one fee shall be charged regardless of the number of persons convicted, when it appears that the apparatus or appliance (the still) is the same.

The opinion referred to in your inquiry, which appears in Volume 13 of the Quarterly Report of Attorney General, page 102, is somewhat confusing. That opinion held that when two men were caught at a still and one of the men was convicted for **possession** of the still, and the sheriff collected a fee of $25.00 under Title 29, Section 134, Code of Alabama 1940, this did not prevent the sheriff from collecting a $50.00 fee under the provisions of Title 29, Section 102, Code of Alabama 1940, when the second or other man was convicted for **manufacturing** or **distilling.**

The fees provided for in Title 29, Section 134, and Title 29, Section 102, Code of Alabama 1940, are entirely separate and distinct. The sheriff in the case stated in your inquiry is claiming the fee of $25.00 under the provisions of Section 134, supra, and not the $50.00 fee under Section 102, supra. One fee is applicable to convictions for manufacturing, selling, giving away, or having in **possession a still** (Title 29, Sections 131 and 134, Code of Alabama 1940), while the other fee is in connection with convictions for distilling and manufacturing **prohibited liquors.** Title 29, Section 102, Code of Alabama 1940.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 16, 1948.

Hon. Ralph P. Eagerton,
Chief Examiner,
Department of Examiners of Public Accounts,
Montgomery 4, Alabama.

Merit System—Salaries—Funds—State and State Departments.

When an employee of the State is separated from the State service and no salary is due the employee, upon demand the employee must pay the amount due for excessive sick leave, such amount to be credited to the fund appropriated to the department for the payment of salaries for the current year.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of March 9, 1948, is as follows:

"Under regulations of the Personnel Board, employees in the classified service are granted one day per month sick leave with a cumulative total of sixty days.

"To attain the total of sixty days an employee would necessarily have to be employed for a minimum period of five years.

"For purposes of discussion it might be noted that a contingent liability accrues yearly for sick leave against the appropriation for that particular year.

"Theoretically such leave as not taken during the year earned would be a salary encumbrance against that particular year.

"We have had an employee who upon separation from service in this department, had overdrawn the sick leave legally allowed.

"Since the date of separation we have received payment for the days of sick leave this employee had taken in excess of those due at time of separation.

"This employee separated from the services of this department since the beginning of the current 1947-48 fiscal year.

"Should the sum received be deposited to the credit of this department against the current year's operations or should all or any part of such sum be deposited to the credit of the General Fund as a refund to prior year operations?"

You advised me that the amount under consideration paid to the employee was paid during the fiscal year 1946-47.

Title 55, Section 194, Code of Alabama 1940, provides in part as follows:

"All unencumbered balances of all appropriations shall revert to the state treasury at the end of each fiscal year and to the credit of the general fund or the special fund from which the appropriation or appropriations were made. * * * *"

The amount involved in your inquiry, having already been spent before the end of the fiscal year 1946-47, could not revert to the general fund or any special fund under the provisions of Section 104, supra; nor

can I agree with your theory that sick leave "not taken during the year earned would be a salary encumbrance against that particular year."

Under Rule XI, Section 2, of the rules of the State Personnel Board, an employee, upon separation from the State service, who has been advanced sick leave in excess of that previously accumulated, is liable for the amount paid for the period of such excess, and (1) a deduction therefor must be made from any salary due the employee, or (2) if no salary is due the employee, demand must be made upon the employee to pay, the amount due "into the state fund from which it was drawn." Upon refusal to do so, the amount due may be collected by suit filed upon request of the State Personnel Director.

It will thus be seen that if any salary is due an employee upon separation from State service, the amount due for excessive sick leave would not be paid but remain in the fund appropriated for the payment of salaries for the current fiscal year. It is my conclusion that if no salary is due an employee upon separation from the State service, and upon demand the employee pays the amount due for excessive sick leave, such amount should be credited to the fund appropriated to the department for the payment of salaries (operating expenses) for the current fiscal year. Any other conclusion would result in the amount due from an employee for excessive sick leave who separated from the State service with salary due him going to (remaining in) one fund, and the amount due from an employee for excessive sick leave who separated from the State service with no salary due him going into another fund.

It is, therefore, my opinion that the amount under consideration should be deposited to the credit of the fund appropriated to the Department of Examiners of Public Accounts for salaries (operating expenses) for the current fiscal year. Cf. Opinion to Hon. W. H. Drinkard, Director of Finance, State of Alabama, under date of March 5, 1948 (Ms.), a copy of which is enclosed for your information.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 19, 1948.

Hon. J. H. Sims,
Judge of Probate,
Bullock County,
Union Springs, Alabama.

Elections—Registration—

Section 178, Constitution of Alabama 1901; Section 181, as amended, Constitution of Alabama 1901; Title 17, Section 17,

Code of Alabama 1940; Title 17, Sections 21-56, Code of Alabama 1940, as amended.

1. A person who is a registered and qualified elector of another county and has paid his poll tax for the current year in such county may not legally register and participate in elections for the current year in any other county of the State, irrespective of his length of residence therein.

2. A person who has moved his place of residence from any county and whose name has been purged from the registration list thereof may only participate in an election in such county by voting a challenged ballot and subscribing to and furnishing the oaths required by law.

3. A person who by reason of age is not subject to the poll tax law, may move to another county at any time, register and participate in elections therein if his qualifications as to residency are sufficient to satisfy the requirements of the Constitution of Alabama, which prescribes that any person must reside in the State for two years, the county for one year, and the precinct or ward for three months immediately preceding any election in which he offers to vote.

4. A person registering thirty days before an election may participate in such election if he has met all the requirements for registration and will, by the date of such election, possess the qualifications as to residence required by Section 178, Constitution of Alabama 1901.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of April 13, 1948, is as follows:

"The question has arisen in this county as to the requirements of an elector from some other county in the State of Alabama.

"First, what is the status of a person, say, registering in Montgomery County who moves into Bulock County and resides the required time that, under the law, would be necessary for him to register if he has paid his poll tax for the current year in Montgomery County, the county in which he is qualified, before he registers in Bullock County?

"Second, what would be the status of an ex-service man, who, under his residential qualifications, moves his place of residence from

Bullock County after he has resided in this county the time that it takes to qualify him, and who has been purged from the list of electors of this county?

"Third, what would be the status of a person who is over the poll tax age, coming into another county and registering after the poll tax season has closed, although he owes no poll tax?

"And fourth, what would be the status of an ex-service man, or any elector, registering, say, thirty days before an election?

"If there is any limitation on any of these questions, I would appreciate very much your analysis."

You first inquire as to the status of a person, who, I assume from your inquiry to be a registered and qualified elector of another county of the State, who now resides in your county and has so resided for sufficient length of time to qualify him for registration, if such county be his bona fide legal residence. I judge that you wish me to advise you as to whether such person may legally register in Bullock County and participate in the elections for the current year therein.

In response thereto, I will state that in my opinion the person here considered may not legally register and participate in any elections in your county until he has fully complied with the requirements of residency as set out in Section 178 and Section 181, as amended, of the Constitution of Alabama 1901.

The statutes of this State governing registration, Title 17, Sections 21-56, Code of Alabama 1940, as amended, provide that each person register as an elector of the county, precinct, and district of his residence, it being further provided by Title 17, Section 86, Code of Alabama 1940, that once so registered, such person may not vote at any other place than that for which registered.

It is also provided by Title 17, Section 17, Code of Alabama 1940, that no person shall lose or acquire a residence by temporary absence from his or her place of residence, without the intention of remaining. In this connection, it has been held by former opinion of this office that the question of the place of one's legal residence is a mixed question of law and fact and that the answer to such question is governed by the intention of the person concerned as expressed by his words and acts. Biennial Report of Attorney General, 1934-36, page 478. Such proposition of law likewise finds support in the decision of the Supreme Court of Alabama in the cases of **Wilkerson v. Lee**, 236 Ala. 104, 181 So. 296; **Griffin v. Wall**, 32 Ala. 149, and **Boyd v. Beck**, 29 Ala. 703.

In the former opinion of this office above referred to, it was also stated that in determining the question of the intention of a party with

regard to his place of legal residence, the declarations of such party, although admissible to prove residence, are not necessarily conclusive because they may be disproved by his acts, and that one of the most conclusive and common acts would be registration and voting in another place.

Such, to me, appears to be the situation in the instant case. If the person here under consideration is a registered elector of another county and has paid his poll tax for the current year in such other county, it would appear to me that by his acts he has disclosed his intention that such other county is his place of legal residence and, as you know, one cannot have two places of legal residence.

I should also point out that it is required by the Constitution and statutes of this State that to enable one to vote in any election he must have resided within the State two years, the county one year, and the precinct or ward for three months immediately preceding the election in which he offers to vote. Section 178, Constitution of Alabama 1901. Therefore, should the person here considered on this date change his intention as to the county of his residence, he would not be eligible to participate in any election therein until he had acquired the requirements of residency above set out. This would of necessity mean that such person would not be eligible to participate in either the primary or general election of this year in the county of his new residence.

I should also point out that to make one eligible for registration as an elector he must prove to the satisfaction of the board of registrars that by the date of the next general election, assuming his place of residence to remain unchanged, he will possess the requirements of residency above stated. Section 181, Constitution of Alabama 1901, as amended. Therefore, should the person here considered now change the county of his residence, he would not be eligible for registration until after the date of the next general election.

I also call your attention to the fact that our laws contemplate the payment of the poll tax due in the county of one's legal residence and in which such person is a qualified elector. There is no provision for the payment of the poll tax in any county other than that in which legally registered, and I find no authority for such a payment. This would seem particularly true in view of the fact that the sums derived from the payment of such poll tax are earmarked for a specific purpose, that is, the public schools of the school district of such elector's residence. It would, therefore, appear to me that it was never intended that the poll tax be paid in any place other than the county of elector's residence at the time such tax became due, and payment in any other county is unauthorized and without effect. **Shepherd v. Sartain,** 185 Ala. 439, 64 So. 57; **Mitchell v. Kinney,** 242 Ala. 196, 5 So. 2d 788.

In answer to your second inquiry, I would point out that if, as you have advised me, such person's name has been purged from the registra-

tion lists of the county, then his name will not appear upon the list of qualified electors furnished the election officials by the judge of probate, and such person, if he votes at all, must vote a challenged ballot, subscribing to and furnishing the oaths prescribed by Title 17, Sections 188-189, Code of Alabama 1940. If the person refuses to take such oath, or if he fails to prove his identity and residence by the oath of another elector, as above prescribed, his vote shall be rejected. If such person willfully and falsely makes such oath, he is guilty of perjury and, upon conviction, may be imprisoned for not less than two years. Title 17, Section 190-191, Code of Alabama 1940.

In your third question, you inquire as to the status of a person, who by reason of age, is not subject to the requirements of the poll tax law, who has now established residence in your county and seeks to register and become a qualified elector therein. You further state that such person owes no back poll tax.

In my opinion, if such person possesses the qualifications of residency sufficient to satisfy the requirements of Section 178 and Section 181, as amended, of the Constitution of Alabama 1901, he may legally register and become a qualified elector of your county and participate in the elections held therein.

It is provided by Section 181, supra, that as a prerequisite to registration an applicant must, if his place of residence shall remain unchanged, have, at the date of the next general election the qualifications as to residency prescribed by Section 178 of the Constitution.

It is required by Section 178, supra, above referred to, that to enable one to vote in any election, he must have resided within the State two years, the county one year, and the precinct or ward for three months immediately preceding the election in which he offers to vote.

It is, therefore, my judgment that if the person mentioned by you in your third inquiry possesses the qualifications as to residency above set out, he would be eligible to register and become a qualified elector of your county. Obviously, the poll tax requirements of Section 178, supra, would not be applicable to him.

I should, however, call to your attention the fact that even though eligible for registration, based upon his prospective attainment of the qualifications of residency by the date of the next general election, such person is not eligible to participate in any election as an elector until such qualifications as to residency have been actually attained. In other words, a person, such as that mentioned by you in your third inquiry, who, assuming his place of residence to remain unchanged, will have, by the date of the next general election resided within the State two years, the county one year, and the precinct or ward three months may now register as an elector of your county, but such person will not be able to vote in any election until he shall have actually resided within

the State for two years, the county for one year, and the precinct or ward for three months immediately preceding the election in which he offers to vote.

In answer to your fourth inquiry, it is my opinion, that a person registering thirty days before an election differs in no way as to requirements and qualifications for registration and voting than any other person. If such person has met all prescribed requirements for registration, has paid all poll tax due, if any, on or before the first day of February preceding, and will have, by the date of such election, resided within the State two years, the county one year, and the precinct or ward three months, in my judgment, such person is entitled to participate in the election.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 21, 1948.

Hon. F. T. Hodges,
Tax Assessor, Henry County,
Abbeville, Alabama.

Constitutional Law — Tax Assessors — Officers — Counties — Costs and Fees.

1. A tax assessor is a county officer within the meaning of Sections 68 and 281 of the Constitution of Alabama 1901, and his compensation cannot be increased or diminished during his term of office.

2. The compensation or allowance to which a tax assessor is entitled is based upon tax collections and not tax assessments. Title 51, Section 30, Code of Alabama 1940.

3. Although the schedule or rate of fees for public officers may not be increased or diminished during their term of office, the legislature or county governing body, acting in its legislative capacity, may modify a law which indirectly or incidentally may have the effect of reducing the total amount of fees or compensation.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of March 15, 1948, is as follows:

"As Tax Assessor in and for Henry County, Alabama, I wish to propound to you for an official ruling the following inquiry, to-wit:

"A statement of facts:

"On March 23, 1915, a general act of the Legislature was approved which provided, 'The Court of County Commissioners or other governing body of like jurisdiction in any County in this State, shall levy and collect such special taxes as it may deem necessary, not to exceed ¼ of one percentum per annum, for the purpose of paying any debt or liability ---- incurred for the erection, construction or maintenance of the public roads since the 28th day of November, 1901, or that may hereafter be created for the erection of ---- bridges or roads; ----' (General Acts of Alabama 1915, Page 210, No. 170.)

"Pursuant to this authority, the Court of Commissioners of Henry County, Alabama, at its regular meeting held in February, 1916, adopted a resolution levying a 2½ mills ad valorem tax for the purpose of road and bridge construction and to be deposited in a Road and Bridge Fund.

"Subsequently, at its meeting held in September 1924, the Court of Commissioners called an election to be held to determine whether or not Road Tax Bridge Funding Bonds in the sum of $165,000.00, payable over a period from 1929 to 1950, would be issued to pay debts in said amount created for construction of public roads and bridges in said County; and as a result of the election the bonds were issued and all bonds with maturity date not yet reached and up to 1950 are still outstanding but none of said Bonds are in default.

"The 2½ mills ad valorem tax has been continued since its levy at the February Term of the Court in 1916 and to the February term of the Court of Commissioners in 1945, when the tax was dropped by action of the Court in adopting a resolution providing that the tax rate for the year would be as follows:

"General Fund	5 mills
"3¢ County wide School tax	3 mills
"3¢ Dist. School tax for Dist. 1 and 2	3 mills
"1¢ County Wide School Tax	1 mill
Total	12 mills

"The same tax rates have been adopted for the years subsequent to 1945.

"I assumed office for my present term as Tax Assessor on October 1, 1943. At that time the 2½ mill road and bridge general levy was in full force and effect and the commissions to which I was entitled to thereon was a material part of the remuneration of the office to which I had been elected for a full term and upon which term I had entered in the discharge of my duties.

"Of course the Tax Collector, who entered into office at the same time I did, collected his remuneration of office on this 2½ mill levy

in 1943 and 1944. But since the pay of the Tax Assessor is always one year behind, I collected on the 2½ mill levy only in 1944 before its suspension in 1945.

"I had made and completed my 1945 assessment by the third Monday in January, 1945, as the law required and dropping of this 2½ mill levy substantially reduced the pay that I received for my services as said Tax Assessor for the year 1945, even though I had made and completed my assessment for that year prior thereto as required by law, and the reduction in remuneration of office will continue throughout the remainder of the present term of the office; this notwithstanding the fact that the Tax Collector is not similarly effected in that he will have colleced on the 2½ mill levy for the years 1943 and 1944 whereas I would have the benefit of it only for the year 1944.

"The questions I wish to propound are as follows:

"1—Am I entitled to collect from Henry County the 2% commission for the remainder of my term from 1945 to 1949 (Sept. 30) the same as if the aforesaid 2½ mill road and bridge levy had not been lifted by the Court of Commissioners; so as to avoid a reduction of the compensation for the office of Tax Assessor during any one term thereof, and so as to keep the offices of Tax Assessor and Tax Collector on par as is intended by the method of compensation?

"2—Since I had made and completed my 1945 assessment by the Third Monday in January, 1945, am I not entitled to my commission for such service based upon the tax rate of the prior year thereto and which had not been changed up to and subsequent to the date that I rendered the service of making said assessments?"

In my opinion, both of your questions must be answered in the negative.

The fees or commissions to which a tax assessor or tax collector is entitled are based upon the amount of taxes actually collected. **Crow v. Board of School Commissioners,** 228 Ala. 107, 152 So. 26; Title 51, Section 30, Code of Alabama 1940. It will be seen by reading Title 51, Section 30, Code of Alabama 1940, that the tax assessor's compensation is not based upon the amount of the assessment, but rather upon the taxes actually collected. **Crow v. Board of School Commissioners, supra.**

The tax assessor being an officer of the county within the meaning of Sections 68 and 281 of the Constitution of Alabama 1901, his schedule of fees or compensation cannot be increased or diminished during his term. **Jefferson County v. McAdory,** 32 Ala. App. 294, 25 So. 2d 396. The legislature is, therefore, prohibited from increasing or diminishing the fees or allowances to which tax assessors are entitled during their term of office. It does not follow that the sum total or aggregate amount of the

fees may not be diminished as a result of indirect action. See **State v. Henry**, 224 Ala. 244, 139 So. 278.

As shown by the facts stated in your inquiry, when you came into office on October 1, 1943, the county was levying and collecting a special tax for roads and bridges which amounted to two and one-half mills. Of course, your compensation under the provisions of Title 51, Section 30, Code of Alabama 1940, was based upon a percentage of the amount of taxes collected, including this item of two and one-half mills. When the county abolished this special levy by making the levy in February, 1945, this action of the county governing body may have had the effect of reducing the aggregate amount of your fees or compensation, but the schedule of fees or allowance as provided for in Title 51, Section 30, Code of Alabama 1940, was not changed. It is the schedule of fees rather than the sum total of fees received that must not be increased or diminished during the term of a public officer. **State v. Henry**, supra. In the **Henry case**, the Supreme Court stated:

> "The doctrine contended for by appellant would be far-reaching. For example, if valuable fees accrue to an officer, say sheriff or clerk, because of laws which greatly enhance the litigation from which he derives fees, no one would contend the Legislature could not repeal such laws because incidentally the fees of the officer would be decreased. If the judge of probate derives large income from the issuance of licenses, no one would insist the Legislature was powerless to increase or decrease the license schedule during his term of office. The insistence subordinates the public interest to an incidental one. Such is not the intention of section 281."

In my opinion, when the county governing body removed the special tax of two and one-half mills in February of 1945, this act may have incidentally or indirectly diminished the compensation of the tax assessor. It is further my opinion that this is not a decrease in fees or allowances prohibited by the Constitution, as the schedule or rate of fees remains the same.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

April 21, 1948.

Hon. M. M. Cantrell,
Sheriff, Marion County,
Hamilton, Alabama.

Sheriffs—Guard Fees—Jails—Prisons and Prisoners—Counties—Costs and Fees.

1. The sheriff is entitled to $2.00 guard fee for lawfully committing each prisoner to jail. Act 483, General Acts 1945, page 721.

2. A sheriff, before he is entitled to a guard fee, should commit the prisoner to the county jail.

3. A county and a town may, by agreement, prescribe that the sheriff may use certain portions of a town or city jail, and in such event the city jail is the county jail, insofar as guard fees are concerned. Title 37, Section 471, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of February 9, 1948, is as follows:

"I write you with regard to guard fees under section 100, title 11 of the 1940 Code.

"Sometimes in making arrests away from the County Seat I have occasion to put prisoners in the Town jail at Winfield. This is done as a matter of convenience, as sometimes my deputies and I will be detained in that section on other work for sometime. Occasionally, while such prisoner is in the town jail he or his friends will arrange bond for him and he will be released by me on proper bond from the town jail without bringing him to Hamilton for imprisonment in the County jail. I should like to have your advice as to whether I am entitled to the $2.00 guard fee as provided in section 100 in a case of this sort.

"It is my contention that imprisonment in any lawful jail is sufficient to justify my being paid the guard fee, and I shall thank you to let me know whether I have to bring prisoners to Hamilton to the County jail in order to get this fee. To so rule would result in a good deal of extra trouble and inconvenience for the prisoner as well as myself and my deputies, at times, and it seems to me an unnecessary inconvenience, since the town jail at Winfield is a lawful jail and serves, it seems to me, the purposes provided by the statute in arresting and imprisoning persons charge with crime."

You are advised that under certain circumstances you may demand and collect the guard fee when prisoners are committed to the town jail. The guard fee referred to in your letter, in the amount of $2.00, is now provided for in Act No. 384, General Acts 1945, page 721. This Act in effect amends Title 11, Section 100, Code of Alabama 1940. This Act provides as follows:

"Section 1. That the Sheriff in all cases, whether begun by indictment or information, shall be entitled to a guard fee of no more nor less than $2.00 for each prisoner lawfully committed to jail.

"Section 2. If the prisoner is convicted and sentenced to the penitentiary or to perform hard labor, the guard fee as provided in the preceding section shall be paid in full out of the convict fund by warrant of the State Comptroller, or like officer; otherwise said guard fee shall be paid out of the county fund from which other sheriff's costs as in cases of acquittal are paid. No part of said guard fee shall be paid out of the county fund if the prisoner is convicted and sentenced to the penitentiary or to perform hard labor.

"Section 3. All laws or parts of laws in conflict with this act or any provision thereof be and the same are hereby expressly repealed."

It is to be noted that there must be a lawful commitment to the jail before the sheriff may demand a fee. In my opinion the jail referred to in this Act is any lawful jail. As applied to the sheriff, it means the county jail, the only jail in the county over which the sheriff has sole management and control. Title 45, Section 115, Code of Alabama 1940.

Under the facts stated in your inquiry, however, it is my opinion that if the county governing body entered into a contract or agreement with the Town of Winfield whereby the Town of Winfield and the county agree that the sheriff may use certain portions of the Winfield jail, it is my opinion that such portions of the Winfield jail may be considered as part of the county jail, so far as the sheriff's fees are concerned. Such an agreement may be entered into by the Town of Winfield and the county under the provisions of Title 37, Section 471, Code of Alabama 1940.

Without such an agreement, it is my opinion that all of the sheriff's prisoners should be committed to the county jail.

It follows that a commitment to the town jail, where there is no agreement by the town and county in compliance with Title 37, Section 471, Code of Alabama 1940, is not a lawful commitment to jail entitling the sheriff to collect a guard fee therefor. This for the reason that the jail referred to in the statute prescribing fees is the jail over which the sheriff has custody and control, namely, the county jail. On the other hand, if there is an agreement pursuant to Title 37, Section 471, Code of Alabama 1940, and that agreement prescribes that the county may use such portions of the town jail, that portion is the county jail insofar as the collection of sheriff's fees are concerned.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 21, 1948.

Honorable Frank C. Manning,
Tax Collector,
Madison County,
Huntsville, Alabama.

Officers—Constitution of Alabama 1901, Section 280.

There is no inhibition against a person holding an office of profit, under this State, being a candidate for another office of profit, under this State.

Opinion by Assistant Attorney General Brooks.

Dear Sir:

Your request for an official opinion, bearing date of January 27, 1948, is as follows:

"Attention Mr. R. S. Brooks, Assistant Attorney General.

"Yours of the 23rd received and I understand, of course, is informal. Frankly I am not interested at this time for Assessor's place next term. My term as Tax Collector will not expire until October 1, 1949, while the present term of Chairman will expire Jan. 1, 1949. I want an official opinion, if you will give it to me, on just this, viz: Can I hold my position as Tax Collector and run for Chairman of County Board? If I can run for Chairman and hold my present position as Tax Collector while I make the race for Chairman, if defeated for Chairman can I still fill my unexpired term as Tax Collector? If I run for Chairman and win, when would I be required to resign as Tax Collector, October 1, 1948, or after General Election in November 1948—or when?

"Thanking you for an official opinion on this."

My answer to your first question is in the affirmative.

There is no constitutional or statutory inhibition against a person, who holds the office of tax collector, being a candidate for another office of profit during his term as tax collector. The only constitutional inhibition relating to this subject is found in Constitution of Alabama 1901, Sectoin 280, which reads as follows:

"§ 280. No person holding an office of profit under the United States except postmasters, whose annual salaries do not exceed two hundred dollars, shall, during his continuance in such office, hold any office of profit under this state; nor, unless otherwise provided in this constitution, shall any person hold two offices of profit at one and the same time under this state, except justices of the peace, constables, notaries public, and commissioner of deeds."

It is to be noted that the inhibition in the above quoted constitutional section is only the holding—that is the occupation—of two offices of profit at one and the same time. There is no inhibition against an office holder being a candidate for another office or position, while holding said office.

My answer to your second question is in the affirmative. The term of office for tax collectors is fixed by statute at a definite period of time, namely, six years. You have been elected for that term and if you are defeated in your race for chairman of your county board of revenue this would not have the effect of terminating your term of office as tax collector. As stated in your request, your term of office as tax collector expires October 1, 1949, and irrespective of what the intervening circumstances might be, such as your being defeated in your race for chairman of board of revenue of your county, such will not shorten or terminate your term of office as tax collector. Consequently, since the only method by which your term of office may be terminated is by your death or resignation, your unsuccessful candidacy for chairman of your county board of revenue would have no affect on your present term of office as tax collector.

In answer to your third question you are advised that if you are elected as chairman of your county board of revenue, it would be necessary that you resign your office as tax collector on or before December 31, 1948. This for the reason, as you stated in your request, that the present term of office of the chairman of your county board of revenue expires on January 1, 1949. Otherwise, as prohibited by Section 280 of the Constitution of Alabama 1901, if you were elected as chairman of your county board of revenue, you would be holding two offices of profit at one and the same time.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 21, 1948.

Honorable J. C. Griffin,
Judge of Probate,
Perry County,
Marion, Alabama.

Children—Adopted Child—Right to inherit.

1. A lawfully adopted child is a descendant of its foster parents in the sense that it may inherit according to the laws of descent and distribution.

2. A lawfully adopted child has the same right of inheritance to real estate and the disposition of personal property as a child born in lawful wedlock.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of April 5, 1948, is as follows:

"Please, give me your interpretation of the word 'descendant.' I am anxious to know whether an adopted child (a full legal adoption) would be entitled to inherit an estate which her deceased foster-mother would have inherited from her father, had she been living. Title 16, Article 1, Code of Alabama 1940, reads as follows: 'The real estate of persons dying intestate, as to such estate descends, subject to the payment of debts, charges against the estate, and the widow's dower, as follows: (1) To the children of the intestate, or their descendants, in equal parts.'

"I am inclined to believe that this child would inherit her deceased foster-mother's share of the estate, however, I am reminded of the case of Williams v. Witherspoon where the Supreme Court ruled that the word 'children' implied his 'blood kin' and not his adopted child.

"I am anxious to know whether the word 'descendant' will protect an adopted child and will deeply appreciate hearing from you at your earliest convenience.

"If I can ever be of service to you in any way, do not hesitate to call on me."

My answer to your question is in the affirmative.

Your attention is directed to Title 27, Section 5, Code of Alabama 1940, which reads as follows:

"§ 5. Record of petition; decree and proceedings; status of adopted child.—The petition and all decrees in adoption proceedings shall be recorded in a book kept for that purpose and properly indexed; such book shall be a part of the permanent records of the probate court in which such proceedings are had and all reports and affidavits shall be properly filed. The files and records of the court in adoption proceedings shall not be open to inspection, or copy, by other persons than the parties in interest and their attorneys, and representatives of the state department of public welfare, except upon an order of the court expressly permitting the same. When the final decree of adoption shall have been entered, the natural parents of the child if living shall be divested of all legal rights and obligations due from them to the child or from the child to them; and the child shall be free from all legal obligations of obedience or otherwise to such parents; and the adopting parent or parents of the child shall be invested with every legal right in respect to obedience

and maintenance on the part of the child as if said child had been born to them in lawful wedlock, and the child shall be invested with every legal right, privilege, obligation, and relation in respect to education, maintenance and the rights of inheritance to real estate, or to the distribution of personal estate on the death of such adopting parent or parents as if born to them in lawful wedlock. Nothing in this chapter shall be construed as debarring a legally adopted child from inheriting property from its natural parents or other kin."

It plainly appears from the above quoted Code Section that a lawfully adopted child has all the legal rights, including the right to inherit real estate, as if said child had been born in lawful wedlock.

It is my opinion that the adopted child mentioned in your request is a descendant of its adopted mother and may inherit real estate under the provisions of Title 16, Article 1, Code of Alabama 1940.

The case of **Williams v. Witherspoon**, 171 Ala. 559, 55 So. 132, which you mentioned in your request, deals with the right of a bastard child born of a slave mother to inherit from the mother. This case has no application whatsoever to the question presented by you.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 23, 1948.

Miss Loula Dunn, Commissioner,
Department of Public Welfare,
421 South Union Street,
Montgomery 5, Alabama.

State Department of Public Welfare—County Department of Public Welfare.

1. In determining need for applicants or recipients of old age assistance, aid to the blind, or aid to dependent children, the Welfare Department may exclude donations to applicants or recipients made by private social agencies or charitable organizations.

2. Income and resources, as used in the Alabama statutes relating to public assistance, does not include gifts by charitable organizations or private social agencies.

Opinion by Assistant Attorney General Sykes.

Dear Miss Dunn:

Your request for an official opinion bearing date of February 6, 1948, is as follows:

"Inasmuch as public funds for public assistance programs are limited and private funds from private social agencies have in some instances been made available to county departments of public welfare, payments to individuals have at times been paid from both public and private funds. These private funds have been accepted in keeping with Title 49, Section 8, Sub-section 18, which gives the State Department of Public Welfare authority to:

" 'Solicit, receive, and hold gifts, devises and bequests of money, real estate, and other things of value to be used in the support, development, and carrying on of its work.'

"Sub-section 7, of the same Section 8, gives the State Department authority to:

" 'Designate county departments as its agents under its rules and regulations to perform any of the state department's functions.'

"Since the administration of the program is the responsibility of county departments of public welfare they have used private funds made available to them to supplement payments from public funds to recipients of assistance. The old age assistance, aid to dependent children, and aid to the blind laws in Alabama include definite provisions for the administration of these programs by the county departments. Likewise, Section 12 ,of Title 49, includes definite responsibilities of county staffs in connection with relief to persons in need of aid.

"Title 49, Sections 20 (Sub-section B), 21, 35 (Sub-section c), 41 and 56 of the 1940 Code of Alabama, as amended, contains provisions relating to the determination of income and resources of individuals applying for old age assistance, aid to dependent children and aid to the blind. On the basis of these provisions and those cited earlier, policies have been set by the State Department of Public Welfare relating to the determination of income and resources.

"I am citing the above laws and giving you certain facts in connection with the present public assistance program in order that I may raise with you a question **concerning aid given directly to public assistance applicants and recipients by private social agencies and charitable organizations.** Based on the above citation of laws governing the operation of the Public Welfare Program and information pertaining thereto, the question I would like answered is—

"May contributions made directly to individuals from private social agencies and charitable organizations be considered as supplementary to public assistance, or must such contributions be considered as income and resources of public assistance applicants and recipients?"

In my opinion, the State Department of Public Welfare may formulate a policy or rule providing that contributions made directly to individuals from private social agencies and charitable organizations need not be considered as income or resources of public assistance applicants or recipients, and further that contributions can be considered as supplementary to public assistance.

In your request for an opinion, you have cited me to several Code sections relating to the determination of need of recipients of public assistance. These Code sections are Title 49, Section 20, Code of Alabama 1940, as amended by Act No. 4, General Acts 1943, page 6; Title 49, Section 21, Code of Alabama 1940; Title 49, Section 35, Code of Alabama 1940, as amended by Act No. 1, General Acts 1943, page 1; Title 49, Section 41, Code of Alabama 1940, as amended by Act No. 1, General Acts 1943, page 1; Title 49, Section 56, Code of Alabama 1940, as amended by Act No. 2, General Acts 1943, page 3.

It may be stated generally that these statutes require that, in determining the need of recipients of public assistance, aid to the blind, old age assistance, and aid to dependent children, the County and State Departments of Public Welfare should take into consideration all **income and resources** of the applicant or recipient. The question is whether such statutory provision prohibits the State Department of Public Welfare and its agencies from excluding gifts made to individuals by charitable organizations and private agencies, when the State or County Department determines the need of the applicant for public assistance.

It is my judgment that Alabama laws designed to aid the blind, the aged, and dependent children should receive a liberal construction in favor of the recipients of public assistance. If an applicant or recipient of old age assistance, aid to the blind, or aid to dependent children happens to receive a contribution from a private social agency or charitable organization, it is my opinion that such applicant or recipient should not be penalized. To hold that private donations to individuals who are also on the public assistance roll should be counted as income or resources, thereby resulting in a smaller public assistance grant to that individual, would, in my opinion, not be in harmony with the spirit of the public assistance laws. This is especially true as long as public assistance grants to individuals are not sufficient to fulfill their essential and minimum needs.

It is further my opinion that the income and resources which should be taken into consideration in determining the need of an individual should be that income or those resources which the applicant or recipient can expect to receive, not what he hopes to receive. Gifts or contributions made by charitable organizations have no guarantee of permanency. The applicant or recipient cannot demand that such contributions be continued, and neither the applicant nor recipient, nor the Welfare Department nor the State of Alabama has any control over the amount of such private contributions or the continuity of such contributions. Further, if the amount of the public assistance grant made to an applicant

or recipient by the Welfare Department is to vary each month according to whether or not each individual applicant or recipient receives a charitable gift from a private agency, the determination of the amount of the public grant of assistance would be a practical administrative impossibility.

For the reasons above, it is my opinion that under its authority "to administer or supervise all forms of public assistance . . ." the Department of Public Welfare is authorized to provide by rule or regulation that, in determining income and resources as related to need, gifts or contributions of charitable organizations or private social agencies may be excluded, and that such contributions may be considered as supplementary to the Public Welfare Program.

It should be added that the rule and regulation should be applied to all applicants and recipients in a uniform manner.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

April 23, 1948.

Honorable F. L. Gaddis,
Judge of Probate,
Autauga County,
Prattville, Alabama.

County Boards of Equalization—Supplemental Pay for Board Members—Boards of Revenue—Title 51, Sections 94 and 95, Code of Alabama 1940 as amended by Act No. 462, General Acts 1945, page 693, approved July 6, 1945.

Board of Revenue of Autauga County is without authority to supplement pay of members of county board of equalization.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of March 30, 1948, is as follows:

"I would like you to render me an official opinion as to whether we can supplement the pay of the County Board of Equalization of Autauga County.

As you know, Autauga County is one of the smaller counties of the State in reference to the assessed valuation. Our Board of Revenue would be glad to supplement the pay of the County Board

of Equalization if it is lawful, as their scale of pay has not been increased since 1940, and you know the cost of living is much higher.

"Thanking you for an early reply to the above, I am."

It is my opinion that the Board of Revenue of Autauga County cannot supplement the pay of members of the county board of equalization.

County boards of revenue are of legislative creation, and are charged with the duty of devoting public funds to the ends prescribed by law. **Woodruff v. Beeland,** 220 Ala. 652, 127 So. 235. There are no laws prescribed providing for county boards of revenue to supplement the pay of members of the county board of equalization.

In addition, the compensation of members of the county boards of equalization is matter of general law provided for in Title 51, Sections 94 and 95, Code of Alabama 1940 as amended by Act No. 462, General Acts 1945, page 693, approved July 6, 1945.

Constitution of Alabama 1901, Section 108, reads as follows:

"§ 108. The operation of a general law shall not be suspended for the benefit of any individual, private corporation, or association; nor shall any individual, private corporation or association be exempted from the operation of any general law except as in this article otherwise provided."

The general law of Alabama being applicable to those cases involving the compensation of members of county boards of equalization, as evidenced by Title 51, Sections 94 and 95, Code of Alabama 1940 as amended by Act No. 462, General Acts 1945, page 693, approved July 6, 1945, no deviation can be made therefrom in the fixation of compensation for members of said boards.

You are therefore advised accordingly that the Board of Revenue of Autauga County cannot supplement the pay of members of the County Board of Equalization of Autauga County.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

April 28, 1948.

Hon. J. V. Chambers,
Judge of Probate,
Chambers County,
LaFayette, Alabama.

Elections—Judge of Probate—Voting Machines—Words and Phrases.

The phrase "the authority charged with holding the same" (elections) appearing in Title 17, Section 103, Code of Alabama 1940, refers to the judge of probate in a county primary election.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of February 18, 1948, is as follows:

"I would like from you an advisory opinion on the following questions:

"1. Who is 'The authority charged with holding the same' referred to in Title 17, Section 103, of the Code of Alabama of 1940 in the coming Democratic Primaries to be held in this County? Is said authority the Chambers County Democratic Executive Committee or the Judge of Probate, Clerk of the Circuit Court, and Sheriff?

"2. Is the compensation of $3.00 referred to in Title 17, Section 103(1), of said Code, now amended to be $5.00, by the other raise granted all election officials?"

In my opinion, the phrase "the authority charged with holding the same," when used in connection with primary elections, refers to the judge of probate.

The pertinent part, Title 17, Section 103, Code of Alabama 1940, is as follows:

"§ 103. Instruction of election officials.—(a) Not less than five days before an election or primary election, **the authority charged with holding the same** shall cause to be held a school of instruction for those who will actually conduct the election or primary election at the polling places. * * *" (Emphasis Supplied)

It is clear, from the above, that the phrase in question referred to the authority charged with holding "an election or primary election."

Nowhere in the Code is it stated that the judge of probate is charged with holding elections; but a review of Title 17, Code of Alabama 1940, will reveal that, by statute, this responsibility falls upon him.

A partial resume of his election duties as outlined in Title 71, Code of Alabama 1940, follows (unless otherwise noted, all of the following Code sections appear in Title 17, supra):

After the registration of voters by the board of registrars is completed, a copy of the list of names by precincts is turned over to the judge of probate (Section 54, as amended by Act No. 483, General Acts

1947, page 333, approved September 25, 1947), who makes a correct list of names by precincts and publishes same (Section 38, as amended by Act No. 482, General Acts 1947, page 331, approved September 25, 1947). He is empowered to employ clerical assistance for this purpose (Section 55) and to properly change the list when territory is detached from one county and added to another (Section 39). When the certificate of any elector, who has been duly registered, has been lost, he issues duplicates (Section 42). At the proper time, he must deliver to the proper election officials a voting list for each voting place (Section 40, as amended by Act No. 482, General Acts 1947, page 331, approved September 25, 1947, to be read in connection with Act No. 655, General Acts 1947, page 504, approved October 9, 1947).

His duties in connection with absentee ballots are outlined in Section 64, as amended by Act No. 478, General Acts 1945, page 711, approved July 7, 1945, now appearing in the 1945 Cumulative Pocket Part, Code of Alabama 1940, as Sections 64(1)-64(14). It is provided that absentee ballots shall be printed and delivered to the judge of probate (Section 64(3) and Sectoin 64(9)) who shall furnish them to the voters (Section 64(4)) upon application made to him by the voter (Section 64(5)). The voter then returns the marked ballot to the judge of probate in general elections or to the proper official in other elections (Section 64(7)). Ballots are turned over to the proper officials by him (Section 64(6)) and the judge publishes lists of persons applying for and casting such ballots (Section 64(8)).

By Section 82, the boundaries of election districts are filed in his office and he publishes notices of changes of such boundaries (Section 85).

In connection with voting machines, he prepares them in county elections (Section 101) and approves the form of the statement of canvass used (Section 113).

He is a member of the appointing board which appoints the officers of elections (Section 120) and he certifies to the register of the circuit court the ineligibility of any member of the appointing board to serve (Section 122).

A list of persons who paid poll taxes is furnished him (Section 137) and he delivers a poll tax list to inspectors at the voting places (Section 138). A certificate of the results of the election is delivered to him to keep for the board of supervisors (Section 139). He is also the legal custodian of the votes presented by the election inspectors (Section 194); **Sartain v. Shepherd**, 173 Ala. 474, 55 So. 919) and a member of the board that canvasses the votes (Section 199). A declaration of the election results are filed in his office (Section 200). He forwards the results of the voting for certain candidates to the Secretary of State (Section 209).

The emblems of the political parties are certified to the judge of probate by the Secretary of State (Section 150) and he takes certain

actions when the party is divided (Section 152). Certificates of nomination are filed in his office (Section 168) and he places names of candidates on the ballots (Section 145, as amended by Act No. 79, General Acts 1945, page 76, approved June 9, 1945). He further prepares instruction cards for voters (Section 185) and forms and stationery for the election (Section 186).

The judge of probate will be notified of special elections (Section 220).

In contested elections, he hears certain cases (Sections 247 and 248) and renders judgment (Section 250) from which there may be an appeal (Section 252). Certain duties are given him in a contest of an election of the judge of the circuit court (Section 243). He is empowered to give copies of registration lists and poll lists to parties in a contested election (Sections 234 and 377) and he may examine the ballots (Section 249).

Statements of campaign expenditures are filed by the candidates with him (Sections 278 and 400); and he is subject to a penalty for neglect of his duty (Section 324).

In primary elections, it is provided that the names of candidates shall be certified to him and that he will prepare the ballots (Section 344, as amended by Act No. 601, General Acts 1947, page 444, approved October 9, 1947). Notices of intention to enter the primary election are filed with the judge of probate (Section 345). The ballots are printed and delivered to him (Section 419). He furnishes lists of voters and the necessary election supplies (Section 354) to the chairman of the county executive committee (Section 363). In the case of a second primary election, the names of the two highest candidates are certified to the judge of probate who then prepares the ballots and election supplies and the names of those finally nominated are filed with him (Section 366; see also Section 369). In the case of a contested election, a declaration of the results of the contest is certified to him (Section 387).

From the above, it may be seen that the judge of probate conducts the election as outlined by statute and is thus "charged with holding the same" in the county primaries.

Title 17, Sections 1 and 39, include primary elections within the general election laws except as modified by Chapter 2 of Title 17. In my opinion, the modifications in Chapter 2, supra, do not remove from the judge of probate the duty of conducting primary elections.

Your second question has been answered in an opinion of this office dated January 13, 1948, rendered to the Honorable J. A. Logue, Judge of Probate, Houston County, Dothan, Alabama, (a copy of which is enclosed), which held "election officials in counties where voting machines are used in whole or in part are entitled to $5.00 per day compensation for such service."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 4, 1948.

Hon. N. M. Payne,
Clerk-Treasurer,
City of Huntsville,
Madison County,
Huntsville, Alabama.

Municipal Corporations—Rearrangement of Ward Lines

1. Any change in the existing ward lines of the City of Huntsville, Alabama, with a population of six thousand and less than twenty thousand, in the absence of statutory exceptions, must be made by the city council not later than three months before the general election in September. Title 37, Sections 7 and 426, Code of Alabama 1940.

2. Any change by the city council of the city of Huntsville, Alabama, of existing ward lines, made not later than three months before the general election in September, although presently effective in making the division, is prospective as to representation until the beginning of the new official term of office commencing the following October.

3. Those persons presently holding office as city officers are entitled to continue in office for the term to which elected, and until their successors are elected and qualified, irrespective of any rearrangement of the ward lines of the city.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of March 9, 1948, is as follows:

"Attached hereto is a certified copy of Resolution No. 21-H adopted by the City Council at its meeting of March 5, which resolution requests you to render an opinion to the City Council of the City of Huntsville, Alabama, covering a number of questions occasioned by the annexation of additional territory to the City of Huntsville, Alabama.

"An early opinion will be appreciated."

The resolution to which you refer in your request for opinion is as follows:

"RESOLUTION 21-H

"A RESOLUTION REQUESTING THE ATTORNEY GENERAL OF THE STATE OF ALABAMA TO RENDER AN OPINION TO THE CITY COUNCIL OF THE CITY OF HUNTSVILLE, ALABAMA,

COVERING A NUMBER OF QUESTIONS OCCASIONED BY THE ANNEXATION OF ADDITIONAL TERRITORY TO THE CITY OF HUNTSVILLE, ALABAMA.

"WHEREAS the City of Huntsville is a Municipal Corporation of more than 6,000 and less than 20,000 inhabitants, and has for many years been governed by a Mayor and City Council, consisting of the President of the Council and eight Aldermen, which Aldermen are elected, two from each of four Wards, by the electorate as a whole; and

"WHEREAS in June, 1947, and again in October, 1947, additional territory was annexed to the City of Huntsville, but up to this time no rearrangement has been made of the Wards and no new Wards have been created; and

"WHEREAS certain questions have arisen on which the City Council of the City of Huntsville desires the advice and opinion of the Attorney General of the State of Alabama;

"NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Huntsville that the Attorney General of the State of Alabama be, and he is hereby requested to advise the City Council of the City of Huntsville upon the following questions and matters:

"1. In the event the four wards of the City of Huntsville, as now composed, should be rearranged, in all probability some one of the present Aldermen's residence would lie in a Ward to which he was not elected to serve as an Alderman. May the City Council adopt an ordinance rearranging the Wards of the City of Huntsville, such rearrangement to be effective at a future date, by having the ordinance provide that on and after a stipulated date, the Wards of the City of Huntsville shall be rearranged, which Wards shall be particularly described?

"2. Each Alderman of the City of Huntsville is elected to serve as an Alderman for one of two places in one of the Wards of the City, there being four Wards and two Aldermen for each Ward, one of such Aldermen being elected to serve as Alderman for Place No. 1 of Ward No. 1.

"If the four Wards of the City of Huntsville, as now composed, should be so rearranged as to place the home or residence of the present Alderman for Place No. 1, Ward No. 1 of the City of Huntsville into the territory designated by the rearrangement ordinance as Ward No. 2, would this vacate the office of such Alderman due to the fact that he would no longer be residing in Ward No. 1?

"3. Would such Alderman continue to serve out the term of the office to which he was elected?

"4. In the event the City of Huntsville should be divided by Ordinance into five Wards and none of the present Aldermen would be affected, how would the new Aldermen for the new fifth Ward be selected?

"(a) Would they be elected by the City Council?

"(b) Would it be necessary to wait until the next General election to select such Aldermen for this Ward?

"(c) Would such Aldermen be appointed by the Governor of the State of Alabama?

"5. In the rearranging of the Wards of the City of Huntsville, should the residence of an Alderman which is now located in Ward No. 1, after such rearrangement, be in Ward No. 2; would this vacate the position of such Alderman who was elected as Alderman from Ward No. 1?

"BE IT FURTHER RESOLVED that the Clerk-Treasurer of the City of Huntsville is hereby directed to submit a certified copy of this resolution to the Attorney General of the State of Alabama.

"ADOPTED this the 5th day of March, 1948.

W. A. Stanley
President of the City Council.

"APPROVED this the 5th day of March, 1948.

A. W. McAllister
Mayor.

"Certified a True Copy:
/s/ N. M. Payne
Clerk-Treasurer"

One of the statutes to be construed in answering your inquiry is Title 37, Section 426, Code of Alabama 1940, reading as follows:

"§ 426. Election of president of council and aldermen.—In cities having a population of six thousand or more, there shall be elected at each general municipal election the following officers, who shall compose the city council for such cities, and who shall hold office for four years and until their successors are elected and qualified, and who shall exercise the legislative functions of city government and any other powers and duties which are or may be vested by law in the city council or its members: A president of the city council; and in cities having seven wards or less, two aldermen from each ward, to be elected by the qualified voters of the several wards voting separately in every ward; except in cities of less than twenty thousand population, in which two aldermen from

each ward shall be elected by the electors of the city at large; in cities having more than seven wards, one alderman from each ward, and a sufficient number of aldermen from the city at large to make the total number of aldermen fourteen exclusive of the president of the council; and in cities having fifty thousand population or more the city council may create not exceeding twenty wards. The president of the council shall have the right to vote on all questions the same as any other member of the council. Provided, however, that the city council of any city having a population of six thousand or more may by ordinance or resolution, if adopted by two-thirds vote of the city council more than six months prior to any general municipal election, provide that the city council of said city shall consist of five aldermen to be elected from the city at large."

The above quoted section provides that the city officers, including members of the city council, shall be elected at a general election held under the provisions of Section 27, Title 37, Code of Alabama 1940, on the third Monday in September 1940, and quadrennially thereafter. This section, of course, applies to an aldermanic form of government.

Section 426, supra, also requires the aldermen to be elected from wards, unless by ordinance or resolution, adopted by two-thirds vote of the council more than six months prior to a general election it is provided that the city (of more than six thousand population) shall be governed by five aldermen to be elected from the city at large.

Under the provisions of this section, the City of Huntsville (having more than six thousand population and less than 20,000 inhabitants according to your statement of facts) shall elect a President of the City Council and two councilmen from each ward, to be elected from the city at large.

Pertinent to the questions you present is Title 37, Section 7, Code of Alabama 1940, reading as follows:

"§ 7. Wards, municipalities divided into.—The councils of the several cities may, by ordinance, divide such city into not less than three nor more than fourteen wards, except as otherwise provided herein, and the numbers and boundaries of such wards may be fixed and changed at any time, except as herein restricted. The several councils, respectively, of cities, at least six months previous to the first general municipal election held under the provisions of this title, shall divide such cities into wards, having as nearly as may be the same number of inhabitants, the lines thereof conforming to the center of the streets or alleys, and being rectangular as far as practicable. Ward lines having once been fixed, shall not be changed by the council within three months previous to an election, nor within eighteen months of the time last established, except in the case of a census showing a population authorizing a change in the form of government, or unless within such time additional territory shall have been annexed to such city, when such councils shall

have the right to create new wards or annex such territory to wards already established.

"Whenever the population of any city exceeds fifty thousand, the council may increase the number of wards thereof, one ward for every four thousand population over fifty thousand."

This section, construed pari materia with Section 426, supra, in my opinion, makes it mandatory that cities with a population classification of six thousand or more inhabitants be divided into wards, with the privilege to return to a government of five councilmen.

Applying these statutes to the questions you present with respect to Huntsville, which has already been divided into wards, it is my opinion that the City Council is authorized to make a change in the ward lines not later than three months before the general election in September of this year, with representation of such newly created wards being prospective to the commencement of the next term of office beginning upon the first Monday in October following the election. It is my further opinion that such change, under the facts you relate, cannot be made so as to effect a change in representation before the commencement of the term of office beginning in October following such election.

The conclusion in the preceding paragraph must be fairly related to the aforequoted statutes and emanate from a reasonable construction thereof. There are no other statutes or laws that I have been able to find which have any bearing upon this conclusion. It is to be noted that Title 37, Section 7, Code of Alabama 1940, supra, is controlling with respect to the time when such city shall be divided into wards. This statute is also controlling with respect to the time element of other cities which have an option to continue to elect aldermen from the city at large without a division of the city into wards Supposing that a city the size of Huntsville is operating under a councilmanic form of government without having made a division into wards, and that the five councilmen reside within the same block, or a majority reside in the same block and the other two within the area of an adjoining block; that the area of their residence cannot practically be put into different wards. If the representation after a division of wards is not prospective in operation to the next ensuing term, then we would have an anomalous situation of five councilmen (who cannot be removed from office except by impeachment. **Hughes v. Stephens**, 219 Ala. 134, 121 So. 397) representing one ward, while the additional wards are **presently** entitled to a lawful number. If the city is six thousand and less than twenty thousand, each of the seven wards would be entitled to two councilmen—a total of fourteen. A present change of representation, after such division has been made, would, under the assumed facts, place seventeen members on the council—five from the one ward which the original members of the council were grouped, and twelve from the other six wards. There would be three in excess of the fourteen (two from each ward) allowed under the law. Section 426, supra.

It is to be further noted that the division into wards seems to be anchored to dates set for the holding of elections. In fixing the time controls (Section 7, supra), the Legislature fixed the time not later than six months before an election, and with the further provision that no change in the ward lines should be made less than three months before an election, except in the event of a change in population authorizing a change in the form of government or the annexation of new territory, in which event the new territory could be added to an existing ward or embraced in a new ward. The fixation of time in relation to elections indicates, to me, that the Legislature intended that the establishment of wards or any changes in existing wards, including incorporation of territory annexed less than three months before an election, be prospective in operation as to representation, although immediately effective in making the division or changes. To hold otherwise, as I have pointed out, could lead to insolvable confusion.

In speaking of the merger, annexation and change of municipal limits of cities of the population classification of Huntsville, the Legislature has provided in Title 37, Section 135, Subsection (9), Code of Alabama 1940, that:

> "The council may create new wards or may enlarge the wards so as to embrace all the territory brought within the corporate limits of the city or town so as to afford opportunity to all persons entitled to vote at elections in the city or town to vote thereat."

In view of all the above, it is my opinion that your first inquiry must be answered in the affirmative, provided the effective date falls within a reasonable time and does not extend beyond the date of the next general election for such city. This latter condition is predicated upon the fact that at the date of the next general election held for such municipality, the electors of the newly annexed territory now incorporated as a ward, or a portion of other wards of the city, should be afforded the opportunity to elect representatives to the city governing body.

Your second inquiry is answered in the negative. Under the provisions of Section 426, supra, the present aldermen are elected for a term of office of four years and until their successors are elected and qualified. Such officers can only be removed from office by impeachment and cannot be legislated or removed from office by a rearrangement of the ward lines of the city.

Your third inquiry, I answer in the affirmative. Those persons presently holding office as aldermen should continue to serve out the term of office to which elected, irrespective of any rearrangement of the ward lines of the city.

Your fourth inquiry is answered by the holding herein to the effect that representation for the newly created or rearranged wards is prospective until the beginning of the term of office following the next gen-

eral election. Representatives should be elected at such election to take office for the ensuing term.

Your fifth inquiry I answer in the negative for the same reasons pointed out in reply to your second inquiry.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 4, 1948.

Hon. O. C. Maner,
Clerk, Court of Common Pleas,
Montgomery, Alabama.

Counties—Montgomery County—Court of Common Pleas of Montgomery—Inferior Courts—Opinions Overruled, Modified or Distinguished.

1. Clerk of the Court of Common Pleas of Montgomery is not entitled to retain five per cent commission on moneys remitted to the State.

2. Only circuit clerks are entitled to retain five per cent commission on moneys remitted to the State under the provisions of Title 11, Section 22, Code of Alabama 1940.

3. Headnote 8 of opinion found in Quarterly Report of Attorney General, Vol. 11, page 131, overruled.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of April 15, 1948, is as follows:

"On June 25th, 1938, you, as Attorney General of Alabama, rendered an official opinion to Hon. Chas. W. Lee, State Comptroller, to the effect that the Clerk of the Court of Common Pleas of Montgomery had the authority to collect and retain five percent commission of all monies collected for the State of Alabama.

"This opinion is found in the Quarterly Reports of the Attorney General, Vol. 11, page 131, 1938.

"At that time the Court of Common Pleas derived its authority from an Act of the Legislature of 1931 (Gen. Acts pg. 11) and the section upon which you based your opinion is found on page 15 of said Acts which reads as follows:

"* * * * 'In addition to the powers herein conferred upon said clerk by this Act, he shall have all the powers and authority ministerial and judicial now and hereafter vested in the clerk of the circuits courts of the State - - -.'

"We are now operating under an Act of the Legislature of Alabama passed in 1939, see Local Acts of Alabama page 87 approved March 15th, 1939.

"On page 91 in section 12 of the Act under which the Court of Common Pleas of Montgomery derives its authority, the identical provision which is quoted above and upon which you based your opinion is brought forward in this Act.

"Please let me know by official opinion whether the clerk still has the authority under the present Act to charge the commission of five percent on all moneys collected for the State."

You refer us to an opinion rendered by this office on June 25, 1938, which opinion held that the clerk of the Court of Common Pleas of Montgomery was entitled to retain five per cent commission on such money collected, because the Act, establishing the Court of Common Pleas of Montgomery, provided in part as follows:

"In addition to the powers herein conferred upon said clerk by this act, he shall have all the powers and authority ministerial and judicial now and hereafter vested in the clerk of the circuit courts of the State."

It is true that the same sentence is included in Act No. 168, Local Acts of 1939, page 87, 91, approved March 15, 1939, but it is my opinion now that this provision of law does not entitle the clerk to retain the five per cent commission.

As you know, circuit clerks are entitled to retain the five per cent commission under the provisions of Title 11, Section 22, Code of Alabama 1940. Since the opinion referred to in your inquiry, there have been several opinions of this office which have held that only the clerks of the circuit courts are entitled to retain this five per cent commission, and not the clerk of an inferior court. See Quarterly Report of Attorney General, Vol. 15, page 296; Quarterly Report of Attorney General, Vol. 20, page 284; also an opinion to Hon. John R. Coffman, Ex Officio Clerk and Register of the Limesotne County Court, under date of January 15, 1948, Headnote No. 7.

You are advised, therefore, that it is my opinion that the clerk of the Court of Common Pleas of Montgomery is not entitled to retain the five per cent commission referred to by virtue of any provision of Section 12 of Act No. 168, supra.

Insofar as the opinion in Quarterly Report of Attorney General, Vol. 11, page 131, is in conflict with this opinion, said opinion is overruled.

There is enclosed a copy of the opinion of the Attorney General under date of January 15, 1948, for your information.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 4, 1948.

Hon. Bradley G. Brown,
License Inspector,
Jefferson County,
Birmingham 3, Alabama.

License Inspector—Jefferson County.

Act No. 536, Local Acts 1947, page 359, authorizing collection by the License Inspector of delinquent court costs and fees, discussed generally.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of November 5, 1947, is as follows:

"Under Act 536, Senate Bill 365, approved October 2, 1947, the License Inspector's Office of Jefferson County is charged with the responsibility of collecting delinquent court cost from all of the courts of Jefferson County, which are as follows:

"Chancery Court
"Circuit Court (Civil & Criminal)
"Jefferson County Court of Misdemeanors
"Inferior Court of Ensley
"Intermediate Civil Court of Birmingham
"Juvenile Court
"Municipal Court of North Birmingham
"Municipal Court of Birmingham
"Probate Court
"Circuit Court of Bessemer
"Bessemer Civil & Misdemeanors Court
"Inferior Court of Leeds

"As there have been several questions to arise under the provisions of this act, I will appreciate your official opinion on the following questions:

"1. Under Section 1, may execution for cost issue at the same time against plaintiff and defendant in the event execution issued under Section 506, Title 7, has been returned 'no property found'

and subsequently issued under 518, Title 7, and Section 7, Title 11 has also been returned 'no property found'?

"2. Does this act require the clerk to issue an execution for delinquent costs against the defendant whether or not it is requested by the plaintiff?

"3. Under Section 3, is it the duty of the clerks of any court in this County to issue execution for County costs in all those cases where said judgment for costs has not become dormant, and in which cases there is court cost that is delinquent within the meaning of Section 1? What is meant by 'dormant cases'?

"4. If, under Section 3, delinquent costs as defined in the act is severed from any judgment for damages, and execution therefor is in the hands of the License Inspector and a request is made for an alias execution to be issued to the Sheriff for said judgment for damages, should Jefferson County court cost issue with execution in the hands of the Sheriff and License Inspector at one and the same time for the collection of the same fees?

"5. What is the definition of that part of Section 3 which is as follows:

" 'That where in any case there is now court costs and fees delinquent within the meaning of the first section of this act, it shall be the duty of the Clerk of any Court or Register, within a reasonable time, to sever such delinquent court costs and fees from any judgment for damages and from such other costs or fees as may not be payable to or for the use of the County, and issue execution therefor which execution shall be directed to the License Inspector and placed in his hands for collection . . . .'

"6. In Section 3, the License Inspector is entitled to institute suit for delinquent costs except where the judgment taxing such cost is barred by the statute of limitations. What is the statute of limitations in each of the above courts?

"7. Under Section 4, what is meant by an execution being continuing authority to the License Inspector until it is recalled or expires as is hereinafter provided? When does an execution expire and when can one be recalled?

"8. Under Section 4, there is provided that the same fees and commissions are allowed the License Inspector as are now allowed to Sheriffs for similar services in the collection of executions for costs. What are these fees and in what amount?

"9. Is the execution issued under this act ever to be returned to the clerk of any court, except in the event it can be recalled by said court?

"10. Under Section 5, this office is given the right to garnishee for costs due the county. If this action is taken, what exemptions are the garnishee entitled to?

"11. Does this office have the right to levy on bank accounts, personal property, real property, or any other assets? What fees or commissions are this office entitled to for taking this action?

"12. After issuing an execution to the License Inspector for costs due the County, can the clerk issue another execution for the Constable fees which are not collectable under this act?

"13. Under Section 6, does it provide prospectively that all executions under this section issued from any court continue in force and effect for ten years and also the lien provided therein shall continue for ten years from date of issuance of such execution irrespective of what the law now is regarding executions and liens in the respective courts?

"14. Is it the duty of the clerks of the court in itemizing delinquent costs to include in these costs a State Trial Tax, presuming that we are to collect this tax?

"15. Is it the duty of this office to remit such trial tax to the Treasury of Jefferson County and he, in turn, remit to the State that part belonging to the State, or shall it be the duty of this office to remit the part belonging to the State, directly to the State?

"16. It is provided in this act that the License Inspector may accept partial or installment payments on delinquent court costs. Under Section 7, 'it is provided that the License Inspector shall, not later than the 10th day of each calendar month, pay into the County Treasury all sums received by him during the preceding calendar month. . . . .' Does this mean that all monies must be turned over to the County Treasurer whether they be partial payments or not? It is entirely possible that we may have some instances where we will accept partial payments on delinquent costs and the delinquent may pay only a small amount which would not be sufficient to pay even the State's part of the Trial Tax, presuming we are to collect this; as a consequence, this procedure would cause considerable confusion and much additional bookkeeping in the distribution of partial payments. Would it be permissible for this office to retain monies collected as partial payments until they are paid in full, or for a reasonable length of time, and then make the proper distribution?

"17. How many years must the clerks go back in the Criminal Division of Circuit Court and Court of Misdemeanors and Felonies, in issuing executions on delinquent cost?"

Your request for opinion presents numerous questions pertaining to Act No. 536, Local Acts 1947, page 359, which I shall treat, setting out my answers thereto, in the order in which such questions are listed in your request.

In my judgment, your first inquiry must be answered in the affirmative. This question is predicated upon the fact that the executions issued against the defendant under Title 7, Section 506, Code of Alabama 1940, and Title 11, Section 7, Code of Alabama 1940, have both been returned "no property found," and no recovery for such cost has been had under the execution issued under Title 7, Section 518, Code of Alabama 1940, for that portion of the cost created by the plaintiff. In such situation, it is my judgment, that Section 3 of Act No. 536, supra, provides and requires that executions issue against all parties liable for the delinquent court cost in question. Section 3, supra, provides, in part, as follows:

> "* * * All such executions shall run against all parties liable to execution for such delinquent court costs and fees and shall authorize the License Inspector to enforce collection from any party of the amount shown by such execution to be payable by such party. * * * *"

Your second inquiry is likewise answered in the affirmative. Again referring to Section 3 of Act No. 536, supra, it is apparent that it is the duty of the Clerks or Registers of the several courts concerned to issue execution, in compliance with the provisions of said act, when such court costs have become delinquent within the meaning of the act. This being the mandatory duty of the Clerk or Register, the request or non-request of the plaintiff that such execution issue could in no way affect the issuance thereof.

Your third inquiry I also answer in the affirmative. Such question, in my judgment, finds answer in that portion of Section 3 of Act No. 536, supra, which provides as follows:

> "That where in any case there is now court costs and fees delinquent within the meaning of the first section of this act, it shall be the duty of the Clerk of any Court or Register, within a reasonable time, to sever such delinquent court costs and fees from any judgment for damages and from such other costs or fees as may not be payable to or for the use of the County, and issue execution therefor which execution shall be directed to the License Inspector and placed in his hands for collection. That where in any case hereafter court costs and fees are delinquent within the meaning of the first section of this act, it shall be the duty of Clerk of any court or Register within thirty days from the date that such court costs and fees are deemed delinquent, to sever such delinquent court costs and fees from any judgment for damages and from such other costs or fees as may not be payable to or for the use of the County, and issue execution therefor which execution shall be di-

rected to the License Inspector and placed in his hands for collection. * * *"

It is to be noted from the above quoted portion of Section 3 that in all cases involving court costs delinquent upon the effective date of Act No. 536, supra, such costs are to be severed and execution issued within a "reasonable time," while in those cases involving court costs becoming delinquent after the adoption of Act No. 536, supra, such costs are to be severed and execution issued within thirty days following such delinquency.

In my judgment, "dormant" cases, as used within Act No. 536, supra, are those cases in which more than ten years have elapsed since the issuance of the last execution under said judgment and, hence, a presumption of payment under Title 7, Section 582, Code of Alabama 1940, has arisen which places the burden of seeking to prove such judgment not satisfied upon the party seeking to enforce such judgment. **Fleming v. Folkes,** 204 Ala. 284, 85 So. 690. Such would necessitate suit by the party seeking to enforce such judgment. In my opinion this is the situation referred to within Section 3, supra, wherein reference is made to "dormant" cases.

In my judgment, your fourth inquiry is one addressing itself to the sound discretion of the issuing court. Under the provisions of Section 4 of Act No. 536, supra, any execution issued thereunder is a continuing authority to the License Inspector after it is placed in his hands and until it is recalled or expires, as provided within such act, to enforce collection thereof. It is also provided by such act that the delinquent court costs be severed from the judgment and execution issued for such delinquent court costs only. Therefore, if request be made of the judge of the issuing court that an alias execution be issued for the judgment for damages, in my opinion, such execution might issue, said execution not including the amount previously severed from such judgment as delinquent court costs. However, it is my further opinion, that should said issuing court determine to issue an alias execution for the full amount of said judgment, including both the judgment for damages and delinquent court costs, then the execution in the hands of the License Inspector for the severed delinquent court costs should be recalled by the court. I can foresee many instances wherein the latter practice would be preferable. I should here point out that Section 4, supra, provides that all executions issued for delinquent court costs shall be under the continuing control of the court from which issued, and for any legal reason, may be recalled by such court. It is also provided that if recalled, an alias execution may be issued of the same force and effect as the original. It is, therefore, my judgment, as above stated, that the matter of recall is a question addressing itself to the sound discretion of the issuing court.

In your fifth inquiry, you request that I define for you a portion of Section 3 of Act No. 536, supra. I find little in the quoted portion of said section to define, as the meaning, in my judgment, is clear and

unambiguous. The only words therein subject to construction are the words "reasonable time," as used in connection with the time in which the Clerk or Register of the several courts must sever delinquent court costs from judgments in force upon the effective date of this act. I can give you no strict definition of these words as here used. In my judgment, much would depend upon the current work load and volume of work of the court concerned, and much weight should be given to the judgment and opinion of the presiding judge of such court as to what would constitute a reasonable time in which to sever delinquent court costs.

The answer to your sixth inquiry is found within Title 7, Sections 19-21, Code of Alabama 1940, wherein is specified the time within which actions upon judgments or decrees of the courts of this State must be commenced. Section 19, supra, provides that all actions upon judgments or decrees of any court of this State must be commenced within twenty years, while, Section 21, supra, provides that actions founded upon judgments obtained before justices of the peace must be commenced within six years.

Your seventh inquiry is answered by the language of Section 6 of Act No. 536, supra, wherein it is provided:

> "That all executions for delinquent court costs and fees shall continue in force and effect for ten years from date of issuance unless sooner recalled in the manner hereinabove provided. * * * * *."

As previously indicated, such execution is a continuing authority to the License Inspector until it expires or is recalled. Likewise, as previously stated, the matter of recall is a question addressing itself to the sound discretion of the issuing court.

In answer to your eighth inquiry, I would point out that it is provided by Section 4 of Act No. 536, supra, that the License Inspector shall be entitled to the same fees and commissions as are allowed by law to sheriffs for similar services in the collection of executions for costs. These fees and commissions are set out in Title 11, Sections 34 and 100, Code of Alabama 1940, which statutes and schedules would govern the fees and commissions accruing to the License Inspector for his services rendered in this regard.

The answer to your ninth inquiry is found within the language of Sections 4 and 6 of Act No. 536, supra, wherein it is provided that any executions issued under the provisions of this act shall be a continuing authority to the License Inspector until recalled or until such execution expires. In no other event, in my judgment, should the License Inspector be called upon or required to return such execution to the issuing court.

In answer to your tenth inquiry, I would point out that Section 5 of Act No. 536, supra, authorizes the License Inspector to institute garnish-

ment proceedings for the collection of court costs delinquent within the meaning of such act. This section also provides that, in the event such action is instituted, "proceedings may be had as in other cases of garnishment, * * * *." Such being the case, it is my judgment that the exemptions provided by the general law in such cases, as found set out in Title 7, Sections 624-632, Code of Alabama 1940, would be applicable to such proceedings.

Your eleventh inquiry, for all practical purposes, is answered by the above. As stated, in the event of a garnishment action by the License Inspector against any person idebted to the county for delinquent court costs, such person would be entitled to the exemptions provided by the general law governing this subject. If the property mentioned by you could be levied upon, under the general law governing suits in garnishment, then the License Inspector would be authorized to so levy. If not, then neither could the License Inspector enforce such levy. As regards the fees or commissions accruing to the License Inspector for such services, it is provided by Section 5, supra, that "the same costs and fees shall be taxed for the services of the License Inspector as are allowed to sheriffs for similar services in garnishment cases * * * *." These are found set out in Title 11, Sections 34 and 100, Code of Alabama 1940.

Your twelfth inquiry, in my judgment, must be answered in the affirmative. You are correct in your statement that the fees accruing to the benefit of the constables of the county do not fall within the purview of this act, and, in my opinion, bear no relation thereto. Such fees are not collectible by the License Inspector.

In my opinion, the effective life of any execution issued under the provisions of this act is governed by the provisions of Section 6 thereof. This section provides that "all executions for delinquent court costs and fees shall continue in force and effect for ten years from date of issuance unless sooner recalled in the manner hereinabove provided * * * *." It is also provided by such section that the lien attaching shall continue for ten years after date of issuance of such execution. I find no conflict here with the general law governing such subject as set out in Title 7, Sections 582-583, Code of Alabama 1940.

Your fourteenth inquiry must be answered conditionally. As I read and understand Act No. 536, supra, such act is designed to effect the collection of only those costs or fees, which if collected would be, under the existing law ultimately covered into the County Treasury of Jefferson County. See Section 1 of Act No. 536, supra. It is also provided within Section s of such act that the clerks of the various courts of the County, in itemizing those delinquent costs and fees due Jefferson County, shall sever such delinquent costs and fees from any judgment for damages and from such other costs and fees as may not be payable to or for the use of the County.

Title 51, Section 20, Code of Alabama 1940, in imposing the State Trial Tax provides that one-half of the $3.00 therein levied shall be paid into the general fund of the Treasury of the State and the other one-half shall be paid into the general fund of the County in which collected.

It is, therefore, my opinion that the clerks of the various courts in itemizing delinquent costs and fees should only include that portion of the State Trial Tax payable to the County and that the License Inspector is not charged with the duty nor authorized under the provisions of Act No. 536, supra, to collect that portion due the State of Alabama.

In view of the answer given above to the effect that the License Inspector is not to collect that portion of the State Trial Tax payable to the State of Alabama, your fifteenth inquiry is not pertinent and does not call for answer.

In my judgment, your sixteenth inquiry is answered by the specific language of Section 7 of Act No. 536, supra, wherein it is provided that:

> "The License Inspector shall not later than the tenth day of each calendar month pay into the County treasury all sums received by him during the preceding calendar month as collections on executions for delinquent court costs and fees together with all sums received by him during such preceding month as fees and commissions for services rendered in the enforcement of such executions. * * * *"

This, in my opinion, requires that the License Inspector pay into the County treasury, not later than the tenth day of each calendar month all sums received by him during the preceding calendar month, whether such collections be partial payment upon any execution or payment in full of such execution. I find nothing within Act No. 536, supra, authorizing the License Inspector to retain in his possession any sums received as partial payments until full payment has been received.

Due to the fact that by law a presumption of payment of any judgment arises after the expiration of ten years from the date of issuance of the last execution thereon, and in view of the language of Section 3 of Act No. 536, supra, to the effect that no execution shall be issued in any case wherein the judgment taxing such court costs and fees is dormant, it is my opinion that the clerks of the courts mentioned in your seventeenth, and last, inquiry should only go back ten years in issuing executions on delinquent costs.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 5, 1948.

Honorable Haygood Paterson, Chairman,
Agricultural Center Board,
CAPITOL.

Agriculture and Industries—Agricultural Center Board.

Agricultural Center Board has lawful authority to contribute, prior to the construction and completion of its regional "cow coliseums," prize money to fat livestock shows sponsored by the said Board. Act No. 282, General Acts 1945, page 447; Act No. 320, General Acts 1947, page 183.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of March 30, 1948, is as follows:

"The General Appropriation Bill approved August 15, 1947 states the following:

"For awarding prizes or premiums at livestock shows, the sum of fifteen thousand ($15,000.00) is appropriated to the Agricultural Center Board annually for each fiscal year ending September 30, 1948 and September 30, 1949. It is provided, however, that the Agricultural Center Board shall not use any of the appropriation for awarding prizes or premiums except at shows sponsored by it and then only to match an equal amount provided for that purpose by subscriptions of private persons, firms and corporations.

"A delegation representing the Montgomery Livestock Show appeared before the Board and asked that they be allotted moneys from this appropriation for their show to be held this April.

"The point in question is whether the Center Board may allocate this premium money before the regional coliseums and Alabama Agricultural Center are built.

"Other laws have given the Center Board either actual control, or nominal supervision over these facilities."

I am of the opinion that your question should be answered in the affirmative.

The Agricultural Center Board was created by Act No. 282, General Acts 1945, page 447, approved July 7, 1945. It is noted that Section 8, thereof, provides:

"This Act shall become effective only upon the building and construction by the Building Commission of facilities to be used as an Agricultural Center as hereinabove provided; provided, however, that upon the allotment by the Building Commission of the necessary funds for the construction of the Agricultural Center, the Governor shall have the authority to appoint the Board hereinabove created."

I am advised that, although no facilities for the Agricultural Center Board have yet been constructed, funds for their construction have been allotted and the first members of the Board were appointed on July 25, 1946.

Although Act No. 282, supra, does not contain a specific award of authority to sponsor fat livestock shows, in my judgment that authority is found in the terms of Act No. 320, General Acts 1947, page 183, approved August 15, 1947, being the "General appropriation Bill," Sub-section XI, of which in part provides:

"For awarding prizes or premiums at livestock shows, the sum of fifteen thousand ($15,000) is appropriated to the Agricultural Center Board annually for each fiscal year ending September 30, 1948 and September 30, 1949. It is provided, however, that the Agricultural Center Board shall not use any of the appropriation for awarding prizes or premiums **except at shows sponsored by it** and then only to match an equal amount provided for that purpose by subscriptions of private persons, firms and corporations." (Emphasis Supplied)

In my opinion the power and authority to sponsor such shows is not, by the terms of Act No. 320, supra, limited to time subsequent to the construction of the so-called "cow coliseum," but sponsorship may arise prior to the construction of such facilities. This conclusion is reached by virtue of the fact that the Legislature on August 15, 1947, appropriated $15,000 per annum in prize money, knowing that no facilities had been constructed at the time and that such facilities probably would not be constructed during this fiscal year. In this connection, I am advised that appropriate sites have been designated, plans and specifications ordered, an executive officer has been appointed and is now on duty, and there has been general stimulation of public interest in fat livestock shows.

Therefore, in my judgment, the Agricultural Center Board may, in its sound discretion, allocate in whole or in part the aforesaid premium money for prizes **at shows sponsored by it** prior to the actual construction and completoin of its regional coliseums. If the Montgomery Livestock Show is a livestock show sponsored by the Board, in my opinion, the Board may lawfully contribute prize money to that show provided the amount of its subscription is matched by private persons, firms, and corporations.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 5, 1948.

Hon. Thomas W. Jones,
Judge of Probate,
Madison County,
Huntsville, Alabama.

Voting Machines—Compensation—Returning Officer.

In those counties in which voting machines are used the person designated from the election officials by the inspector at each voting place to return the statement of canvass to the proper official is entitled to five cents per mile on going to the courthouse and returning to the place of holding the election.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of July 25, 1947, is as follows:

"Elections—Voting Machines—Returning Officer—Title 17, Sec. 105-112.

"Referring to your opinion on this subject—July 22, 1947, in which you state that in elections in which voting machines are used, there is no necessity nor is there any authority for the appointment of a returning officer in such elections.

"Section 112 of this Title with reference to the duties of the election officials set out that the original statement of canvass is to be delivered in the same manner and to the same authorities as now provided by law and further 'the INSPECTOR shall deliver to the - - County Board - - the keys of the machine' & c. The inspector might reasonably contend that there was no obligation upon him to return the keys the night of the election and could return it at his convenience within—say five days.

"Assuming that the statement of canvass should be delivered on the day after the election, the question would arise as to which of the election officials should volunteer or be requested to deliver it to the county seat with no provision for compensation. I then would like to know if there is any provision for paying mileage to the election official who happens to deliver the statement of canvass."

Before proceeding to answer your question, I deem it advisable to trace the history of the compensation allowed for election officials since the adoption of the Voting Machine Act.

At the time the Voting Machine Act was adopted all election officials in the State received as compensation two dollars per day. In 1943 the Legislature, by Act No. 409, General Acts 1943, page 375, allowed those persons who attended the school conducted for instructing officials to serve in those elections where voting machines were used an extra three dollars for attending said school and serving on day of election. The Legislature in 1945, General Acts 1945, page 359, modified the 1943 Act, but left the compensation of those election officials serving on voting machines at three dollars per day over and above the compensation then allowed by law for other election officials. The result thereby being that those officials who serve on voting machines were receiving a compensation of five dollars per day for such service, whereas other election officials were only receiving two dollars per day.

The Legislature in 1947, by Act No. 127, General Acts 1947, page 38, recognizing the inequality of this situation, increased the compensation of elections officials who did not serve on voting machines to five dollars per day, thus showing a definite legislative intent that the compensation of all election officials throughout the State should be uniform.

It is stated in Title 17, Section 112, Code of Alabama 1940, that the statement of canvass of the result of elections held on voting machines shall be signed by the election officials and delivered in the same manner and to the same authorities as now provided by law. Unquestionably, the Legislature intended that one of the election officials serving on voting machines was to deliver this statement of canvass to proper authorities.

It is provided in Act No. 127, supra, that the returning officer shall receive five cents per mile in going to the courthouse and returning to the place of holding the election as compensation for his service in making the return of the election.

With the legislative intent in mind that the Legislature intended that all election officials throughout the State should receive the same compensation, it is my opinion that the inspector may either designate himself or one of the other officials serving on voting machines as the person to deliver the canvass of returns to the proper authorities. This person, by whatever name he might be designated, is, in my judgment, entitled to the five cents per mile for services rendered by him as provided by Act No. 127, supra.

The opinion of this office to which you refer, rendered on July 27, 1947, in which it was held that it was not necessary nor is there any authority for the appointment of a returning officer in those elections in which voting machines are used, is still adhered to. The phrase "returning officer," as used in that opinion, referred to the returning officer mentioned in the election laws of the State other than those laws dealing with the use of voting machines.

However, as hereinabove set out, it is my opinion that the person who actually delivers the results or canvass of the election in those counties using voting machines is entitled to compensation of five cents per mile regardless of the fact of whether you call him a returning officer or by some other name.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 7, 1948.

Hon. J. T. Burch,
Tax Assessor,
Morgan County,
Decatur, Alabama.

Corporations—Taxation—Exemptions.

The fact that the plant and the personal property used therein or connected therewith of a corporation engaged in manufacturing aluminum products is exempt from taxation under the provisions of Title 51, Section 10, Code of Alabama 1940, does not exempt shares of said corporation from the tax levied by Title 51, Section 25, Code of Alabama 1940; nor does it exclude the value of such property from the measure of the tax on the shares of stock.

Opinion by Assistant Attorney General Tiller.

Dear Sir:

Your request for an official opinion, bearing date of March 20, 1948, is as follows:

"I would like to request an official ruling as to collection of residue capital stock tax on a company exempt under Section 10 of Title 51 of the Code of Alabama 1940.

"Southeastern Metals Company, Incorporated, has filed an affidavit showing that all of its tangible property assessed for taxation for the year 1948 is exempt from all ad valorem taxes since it is engaged exclusively in manufacturing aluminum products.

"The corporation does not own any real estate, but rents the buildings which house its plants.

"In prior years there has been no residue of capital stock for assessment because the ad valorem assessment of the company equaled or exceeded sixty per cent of the value of the capital stock as de-

termined by the State Department of Revenue. According to the balance sheet filed by the company this year, however, there will no doubt be residue and I desire your opinion as to whether or not this residue is also exempt under the provisions of Section 10 of Title 51 of the Code of Alabama of 1940."

Title 51, Section 10, Code of Alabama 1940, provides as follows:

"All factories and manufacture plants manufacturing calcium cyanamide (lime nitrogen) aluminum or aluminum products shall be exempted from state, county and municipal taxation for ten years after the beginning of the construction of such plant or factory. The exemption provided herein **shall apply solely to the factory or plant and to the personal property used therein or connected therewith in the manufacturing of said articles;** but shall not apply to the land upon which such factory or plant is located." (Emphasis supplied.)

It will be seen from the above statute that the exemption of the factory or manufacturing plant manufacturing the products enumerated therein applies "solely to the factory or plant and to the personal property used therein or connected therewith." Shares of stock of a corporation are not included in the classes or kinds of property enumerated in this statute. Furthermore, shares of stock issued by a corporation are not the property of the issuing corporation but are the property of the shareholders.

The tax on shares of domestic corporations is levied under the provisions of Title 51, Section 25, Code of Alabama 1940, which is in part as follows:

"§25. Assessment and collection.—Every share of any domestic corporation, except financial institutions which comply with the provisions of this title as to excise taxes herein levied on such financial institutions * * * shall be assessed and the taxes thereon collected in the county wherein such corporation has its home or chief office in the state **and shall be assessed at sixty percent of its value to the person in whose name such shares stand on the books of the corporation and not to the corporation.** * * * * After the assessed value of all the shares has been passed on and determined the department of revenue shall deduct from the total (assessed) value of such shares the assessed value of the real and personal property of the corporation as shown by such tax return by the corporation or finally determined and the value of the residue remaining after deducting the assessed value of the real and personal property as finally determined shall constitute the assessment against the shares of such corporation, and such residue divided by the whole number of shares shall constitute the assessment of each share for taxation. * * * *." (Emphasis supplied.)

The tax levied by Section 25, supra, is assessed against "the person in whose name such shares stand on the books of the corporation and

not to the corporation." However, under the provisions of Title 51, Section 28, Code of Alabama 1940, "if a corporation when making the assessment required by Section 25, supra, by endorsement on such assessment or otherwise in writing, 'shall agree to pay the taxes, if any, assessed on the shares for the shareholders, it need not file a list of such shareholders.' " All, if not most, domestic corporations agree to pay the tax for the shareholders under the provisions of Section 28.

Section 10, supra, exempts certain properties of the corporation therein referred to from ad valorem taxation but the fact that said property is exempt from taxation to the corporation does not mean that the value of said property should be excluded from the total value of the shares of stock or that there should be any deduction whatsoever from the total value of the shares of stock on account of such property. The value of such property is included in the residual value of the shares of stock for taxation under Section 25, Title 51, Code of Alabama 1940, and the opinions of the Supreme Court of this State construing said section. **Ex Parte State,** 66 So. 1, overruled **Elmwood Cemetery Co. v Tarrant,** 170 Ala. 459, 54 So. 186. Said **Ex Parte State** holds that the property exempt to the corporation is not allowable to the shareholder. **Tarrant v. Bessemer National Bank,** 7 Ala. App. 285, 61 So. 47, also holds that the value of United States bonds which are exempt from ad valorem taxation is included in the value of the shares of stock for taxation. Furthermore, the share-stock tax is a liability against the shareholder and not the corporation, although the corporation may agree to pay the tax. The only deduction allowed to the shareholders from the total assessed value of their shares is the assessed value of the real and personal property assessed to the corporation, and since said property is not assessed to the corporation, there is no allowable deduction on account of such property from the value of the shares of stock.

In view of the above conclusions, it is my opinion that the shareholders of the corporation are entitled to no exemption from the tax levied under the provisions of Section 25, supra, on account of the exemption of the corporation from taxation under the provisions of Section 10, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 10, 1948.

Hon. T. R. Ward,
Judge of Probate,
Henry County,
Abbeville, Alabama.

Counties—Henry County—Constitutionality—Statutes.

1. Section 7 of Act No. 82, Local Acts 1947, page 58, held unconstitutional as violative of Constitution of Alabama 1901, Section 96.

2. The remainder of Act No. 82, supra, is not affected by the unconstitutionality of Section 7 thereof.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of April 14, 1948, is as follows:

"During the 1947 session of the Legislature there was passed a local law, which is No. 83, page 60 of the Local Acts of Alabama, of 1940. You will note that this act provides among other things for a redistricting of the commissioners districts; provides for their election from the County as a whole and provides that the pay be $720.00 per annum (in the past the pay had been $360.00 per annum). You will also note that the law takes effect upon its approval. I have a number of inquiries to make about this law, VIZ:

"1. Is the part pertaining to the rate of compensation to be paid these officials unconstitutional due to the fact that the pay is increased for the term for which they were elected or for any other reason or is this provision of the law merely held in abeyance during the terms of the officials elected before the passage of this act?

"2. If the law is merely held in abeyance will the commissioners elected at the present elections be entitled to $720.00 per annum and the ones elected two years ago be entitled to $360.00 per annum for the same work?

"3. If the mentioned provision of the law is unconstitutional will it affect the other provisions of the Act in any way? In other words will the fact that this provision is unconstitutional or is held in abeyance cause any other part of said act to be unconstitutional or held in abeyance?

"We have candidates running for the office of commissioner who believe that the new rate of pay will be effective upon their taking office. Will therefore appreciate your early attention to this. You can realize what a howl it will cause for different rates of pay."

In your request, you refer to Act "No. 83, page 60 of the Local Acts of Alabama, of 1940." However, it is apparent that the Act to which you meant to refer is Act No. 82, Local Acts 1947, page 58.

In answer to your first inquiry, it is my opinion that Section 7 of Act No. 82, supra, fixing the compensation of the commissioners of

Henry County at $720.00 per annum, is unconstitutional and void, in that it is violative of the Constitution of Alabama 1901, Section 76, which is as follows:

> "Sec. 96. The legislature shall not enact any law not applicable to all the counties in the state, regulating costs and charges of courts, or fees, commissions or allowances of public officers."

See **Carnley v. Moore,** 218 Ala. 274, 118 So. 409, and the following opinions of this office: Quarterly Report of Attorney General, Vol. 2, pages 70 and 295; Quarterly Report of Attorney General, Vol. 3, page 210.

The above conclusion renders unnecessary a further consideration of your first inquiry.

Having held that Section 7 of Act No. 82, supra, is unconstitutional, in answering your first inquiry, it is not necessary to answer your second inquiry.

> "It is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another part and that if the invalid part is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected. * * * *
>
> " * * * * * *
>
> "* * * * * Thus, it is stated that if after eliminating the invalid portions, the remaining provisions are operative and sufficient to accomplish their proper purpose, it does not necessarily follow that the whole act is void; and effect may be given to the remaining portions. * * * * * * In any case where it is sought to apply the general rule, the constitutional and unconstitutional parts should be severable so that the valid portion may be read and may stand by itself. * * * *" 11 Am. Jur., Constitutional Law, Section 152.

> "A part, or a section of a statute may offend the constitution, State or National, and if there are other parts or sections, separable from, not dependent upon it, capable of full execution without it, their validity is not affected.—Ex parte Pollard, 40 Ala. 77." **Vines v. The State of Alabama,** 67 Ala. 73.

> "In this state it has been repeatedly held that where a statute contains valid and invalid provisions, and the invalid parts can be stricken from the act and leave the enactment complete within itself, sensible, capable of being executed, and wholly independent of that which is rejected, the enactment will be upheld and enforced as to valid parts." **Lovelady v. The State,** 15 Ala. App. 615, 74 So. 734.

See also **State v. Roden,** 15 Ala. App. 385, 73 So. 657; **State v. Pitts,** 160 Ala. 133, 49 So. 449; **Dunn v. Dean,** 196 Ala. 486, 71 So. 709.

Answering your third inquiry, in view of the above authorities, it is my opinion that the unconstitutionality of Section 7, supra, does not

invalidate the other sections of the Act. Section 7 may be stricken from the statute and leave the enactment complete and effective.

In your request, you state that prior to the passage of Act No. 82, supra, the compensation of the commissioners of Henry County was fixed at $360.00 per annum. No doubt, this compensation is fixed by Act No. 206, Local Acts 1932, Extra Session, page 91. However, since you have raised no question as to the constitutionality of said Act, no consideration is here given to the constitutionality of the same.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 10, 1948.

Hon. Tom B. Ward,
County Attorney,
Tuscaloosa County,
612-617 Alston Building,
Tuscaloosa, Alabama.

Courts of County Commissioners—Boards of Revenue—Employees Vacations.

It is within the discretion of the Board of Revenue of Tuscaloosa County, Alabama, to give its regular employees, who are employed by the County in building roads and bridges, and keeping them in repair, a vacation with pay.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of March 18, 1948, is as follows:

"In re: Employees of Tuscaloosa County, engaged in building roads and repairing roads and also in building and repairing bridges for Tuscaloosa County, Alabama—vacation with pay.

"Tuscaloosa County has a good many employees who are engaged in building and repairing roads for the County; and also some of the employees are engaged in building and repairing bridges for Tuscaloosa County, Alabama. Some few of the employees who are engaged in road work and some few of the employees who are engaged in bridge work are paid straight salaries for each month, but most of them are not paid salaries but are paid for the time they work and at the rate of a certain amount per hour.

"The question has arisen whether or not the Board of Revenue can grant or give to the above employees a vacation of something like a week or two weeks each year with pay.

"There seems to be some doubt whether or not the Board of Revenue of Tuscaloosa County, Alabama, can give such employees a vacation each year of a week or more with pay. So far we have been unable to find any general statute or any local act for Tuscaloosa County, giving or authorizing the Board of Revenue to grant or give to such employees a vacation with pay. We have been requested to write you and ask your opinion as to whether or not the Board of Revenue of Tuscaloosa County can give to its above referred to employees a vacation of something like a week or more with pay. Therefore, the Board of Revenue of Tuscaloosa County, Alabama, would like for you to answer the following questions to-wit:

"1. Can the Board of Revenue legally give its employees a vacation of something like a week or more with pay when such employees are engaged in building roads or repairing roads and also when such employees have a fixed salary for each month?

"2. Can the Board of Revenue give its employees a week's vacation or more with pay when such employees are engaged in building bridges or repairing bridges and such employees receive a fixed salary each month?

"3. Can the Board of Revenue legally give its employees a vacation of something like a week or more with pay when such employees are engaged in building roads or repairing roads and when such employees are working by the hour and paid a certain sum for each hour's work?

"4. Can the Board of Revenue legally give its employees a vacation of something like a week or more with pay when such employees are engaged in building bridges or repairing bridges and when such employees are working by the hour and paid a certain sum for each hour's work?

"The Board of Revenue would like to have your opinion on the above matter and questions at your first opportunity.

"Please let us know that you have received this request of the Board of Revenue of Tuscaloosa County, Alabama."

In my opinion, all of your questions should be answered in the affirmative as these questions are within the discretion of the Board of Revenue of Tuscaloosa County, Alabama.

This office has held that under Title 23, Section 43, Code of Alabama 1940, the county governing bodies of the several counties are vested

with broad powers in reference to public roads, bridges and ferries within their respective counties. Quarterly Report of Attorney General, Vol. 39, page 34; Biennial Report of Attorney General, Vol. 31, page 54.

Under such section, the county governing bodies may make and enter into such contracts as may be necessary, or may be deemed necessary or agreeable to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their counties.

The county governing body's authority to employ certain people for the purpose of building roads and bridges and keeping them in repair necessarily carries with it the right to fix the compensation of its employees. This compensation may be on a monthly or hourly basis, and as a part of the compensation may include a vacation with pay after a certain period of regular employment.

It is common knowledge that employees are more contented and, therefore, perform their duties in a more efficient manner when they are given a vacation with pay each year.

The test as to whether or not an employee should be given a vacation with pay should not be as to how he is compensated, but should be based on how long the employee has been regularly employed by the county. In my opinion, if an employee, who is compensated by the month, has been regularly employed for twelve consecutive months, then he should be entitled to a vacation with pay. If an employee, who is compensated by the hour, has been regularly employed for a certain number of hours which are equivalent to twelve months or one year of employment, then he should be given a vacation with pay.

The premises considered, it is, therefore, my opinion, it is within the discretion of the Board of Revenue of Tuscaloosa County, Alabama, to give its regular employees, who are employed by the county in building roads and bridges and keeping them in repair, a vacation with pay.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 10, 1948.

Honorable J. D. Mitchell,
Director,
Department of Public Safety,
CAPITOL.

Motor Vehicles—Drivers' Licenses—Statutes.

Under the provisions of Title 36, Section 68, Code of Alabama 1940, it is mandatory on the Director of Public Safety,

upon receiving a record of the conviction of a person of the offense of driving a motor vehicle while intoxicated, when such conviction has become final, to revoke the drivers' license of such person, notwithstanding the provisions of Title 36, Section 2, Code of Alabama 1940, as amended by Act No. 379, General Acts of Alabama 1947, page 271, relating to the authority of the court to prohibit a person so convicted from driving a motor vehicle on the highways of this State.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of April 15, 1948, is as follows:

"In view of the provisions of Title 36, Section 68, Code of Alabama 1940, requiring the Director of Public Safety to revoke a driving privilege or driving license of a person who has been finally convicted for driving while intoxicated or other offenses enumerated in this statute, and further in view of the fact that Act No. 379 of the General Acts of 1947 amended Section 2 of Title 36 of the 1940 Code, please advise me whether or not it is mandatory for the Director of Public Safety to revoke a driving privilege or license when the Director is notified that such person has been finally convicted for driving while intoxicated."

I am of the opinion that your inquiry should be answered in the affirmative.

In construing the provisions of Title 36, Section 2, Code of Alabama 1940 ,and Title 36, Section 68, Code of Alabama 1940, this office, in an opinion rendered to the Director of Public Safety on September 15, 1941 (Quarterly Report of Attorney General, Volume 24, page 208), held as follows:

"It is mandatory on the Director of Public Safety, upon receiving a record of the conviction of a person of the offense of driving a motor vehicle while intoxicated, when such conviction has become final, to revoke the driver's license of such person, notwithstanding the fact that the offense has prohibited the person so convicted from driving a motor vehicle upon the highways of this state for a certain period of time, within the limits prescribed by statute."

This opinion held that each of the two allegedly contradictory Code sections in question had a separate field of operation and that the mandatory provision of Section 68, supra, should be followed when applicable, the provisions of Section 2, supra, to the contrary notwithstanding. See Quarterly Report of Attorney General, Volume 37, page 95; and **Ex Parte Smith, Director of Public Safety,** 30 Ala. App. 24, 200 So. 114.

The question now presents itself as to whether or not the provisions of Act No. 379, General Acts 1947, page 271, amending Section 2, supra, has the effect of changing the holding of the opinion rendered to the Director of Public Safety under date of September 15, 1941. In my opinion, it does not.

Section 2, supra, made it unlawful for any person, whether licensed or not, who is a habitual user of narcotic drugs, or any person who is intoxicated, to drive any motor vehicle upon any highway of this State. The court trying the cause, as additional punishment, had authority to prohibit, and must have prohibited, a person so convicted from driving any motor vehicle upon the public highways of this State for a period not to exceed one year. On a second or subsequent conviction, the court, as additional punishment, had authority to prohibit such person from driving a motor vehicle upon the highways of this State for a period of not less than thirty days and not more than one year. The 1947 amendment changed the above proviso as to additional punishment. It provided that upon the first conviction the court shall have authority to prohibit the person so convicted from driving any motor vehicle upon the highways of this State of a period not to exceed one year, and upon a second or subsequent conviction, the court shall prohibit the person so convicted from driving a motor vehicle upon the highways of this State for a period of not less than thirty days nor more than one year. Your particular attention is called to the discretionary and mandatory provisions of both the Code section and the amendment.

As pointed out in the opinion to the Director of Public Safety, dated September 15, 1941, supra, Section 2, supra, was a prohibitory statute. It prohibited persons convicted thereunder from driving when so ordered by the court, regardless of whether the party so convicted holds a driver's license or not. Any action taken under this section was of a judicial nature. The same is true of the 1947 amendment. On the other hand, Section 68, supra, is a statute of an administrative nature, making it mandatory that the Director of Public Safety revoke a drivers' license upon certain conditions. It does not prohibit a person from driving a motor vehicle, but a person who drives a vehicle without a license would be liable to criminal prosecution.

The 1947 amendment to Section 2, supra, does not, in my judgment, in any wise affect the purpose of the two sections in question. The reasoning and holding of the opinion to the Director of Public Safety, dated September 15, 1941, supra, is, in my judgment, still applicable to the present statutory law.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 11, 1948.

Honorable G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.
Veterans—Exemptions—Licenses—Counties.

Act No. 353, General Acts Regular Session 1945, page 570, approved July 6, 1945. Veteran is not entitled to an exemption from county license levy in more than one county, notwithstanding the fact that at the time of application he had not previously made use of his full $35.00 exemption in the other county.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

Your request for an official opinion, bearing date of March 30, 1948, is as follows:

"Please advise me on the following question:—

"A Transient Dealer's license is $30.00 for the State and a County license of $5.00 in each county in which he does business—see Title 51, Sec. 609, 1940 Code of Alabama.

"The 1945 Acts, page 570 provide that a Veteran otherwise qualified shall be exempt up to $35.00 State and $35.00 County license.

"Now if a transient dealer buys his State license in a County and his $5.00 County license also, may he then go to other Counties and secure the County license in these Counties and be exempt the $5.00 for the County license until he has secured the total county exemption to $35.00.

"You will note Acts 1945, page 750, Sec. 3, provides that each such veteran may be exempt up to $35.00 County license. 'However no such veteran may claim the exemption in more than one County.' Do not the words 'the exemption' in the above quotation mean the total exemption—That is a veteran can get a license in one county where the state license is $35.00 or more and the county license is $35.00 or more, and secure his $35.00 exemption for each. Then of course he can not go to another county and secure the same kind of license and have the total exemption a second time.

"A construction that a veteran is confined to one county license of $5.00 would seem to be a discrimination in favor of a veteran who can secure a total $35.00 exemption in one county, and would be repugnant to a reasonable conclusion as to the intent of the legislature.

"As to enlightening extracts from rulings of your office and provisions of law bearing on the principle involved I cite:

"1. It is noted that Title 51, Section 862, expressly provides that the part of the license not claimed in county of residence may be claimed in county other than county of residence provided the limitation of $25.00 is not exceeded.

"2. In an opinion of your office contained in Volume XX, page 193, the following reference is used.

"'It is a familiar rule of statutory construction that where a statute is uncertain on its face, prior or contemporaneous statutes may be looked to in an effort to arrive at the intention of the legislature, and this applies with peculiar force to statutes dealing with the same subject matter passed at the same session of the Legislature, 215 Ala. 640, 112 So. 243. There is another rule of statutory construction that the purpose to be accomplished may be considered in arriving at the Legislative intent. 3 Ala. App. 634, 57 So. 122.'

"In your opinion addressed to Hon. W. W. Hill, Judge of Probate, Montgomery County, dated September 17, 1945, the following statement is made, I quote:

"'I am unable to find any conflict in the legislation restricted to disabled veterans and the legislation providing the temporary exemption for all veterans, whether disabled or not. The result is, as I see it, that a disabled veteran of World War II may, provided he qualified under the provision of law, claim both the $25.00 exemption and the $35.00 exemption for a period of three years and may apply such credits amounting to $60.00 in payment of two or more licenses whether they are State, County or Municipal licenses, and upon payment of the balance due after allowing for the credit such veteran would be entitled to the license.'

"4. Your opinion addressed to Hon. L. W. Price, Judge of Probate, Evergreen, Ala., dated August 18, 1938 found in Biennial Report Attorney General 1936-38, page 740 you quote '* * * * * * is nothing more than an enlargement and extension of the same business. * * * * * *'

"'The act granting exemption to a veteran limits such exemption to one business or occupation for which a license tax is required. It is my conclusion that the veteran mentioned in your letter, assuming that the new pumps are merely an addition to existing equipment for which an exemption has been granted, is entitled to an additional exemption, the amount of which, together with the exemption already granted on the same business, may not exceed the limit of exemption prescribed for one business.'

"5. My conclusion was and is that the Legislature intended that a World War II Veteran, meeting other requirements was and is entitled to a total of $35.00 exemption even though part of such exemption is allowed in another county and that the words used were intended to prohibit a veteran from receiving $35.00 exemptions in more than one county, that is, a total of $70.00 in two counties. All of the above quotations were used as a basis for arriving at this conclusion.

"My records are being audited by State Examiners and I will greatly appreciate your early consideration in this matter."

In answer to the question asked by you, it is my opinion that the provision in Section (3) of Act No. 353, General Acts Regular Session 1945, page 570, approved July 6, 1945, that "no such veteran may claim the exemption in more than one county" means that the veteran is not authorized to secure an exemption from a county levy in more than one county, notwithstanding the fact that at the time of application he had not previously made use of his full $35.00 exemption in the other county.

Exemptions from taxation are strictly construed against the claimant and in favor of the taxing authority. The statute does not state that no veteran may claim the total exemption in more than one county. When the Legislature intended to permit a veteran to claim an exemption in more than one county, it expressly so provided as in Title 51, Section 862, Code of Alabama 1940, with respect to disabled veterans. Quarterly Report of Attorney General, Vol. XL, p. 50.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 12, 1948.

Hon. J. A. Stephens,
Commissioner of Revenue,
State Department of Revenue,
CAPITOL.

Taxation — Exemptions (Gasoline and Tobacco) — National Guard Canteens or Post Exchanges—Title 35, Section 110, Code of Alabama 1940.

1. Post exchanges or canteens, owned, operated and run exclusively by national guard units are exempt from the payment of State gasoline and tobacco privilege or excise taxes, when operated in accordance with rules and regulations promulgated by the Adjutant General and approved by the Governor, Title 35, Section 110, Code of Alabama 1940.

2. Exemptions from State tax provided to post exchanges or canteens, operated and run by national guard units, are mandatory as to gasoline and tobacco sold to members of the national guard, but the Adjutant General, with the approval of the Governor, may regulate, limit or refuse to sell tobacco and gasoline, or either of them. Title 35, Section 110, Code of Alabama·1940.

3. The State tax exemption as to gasoline and tobacco provided in Title 35, Section 110, Code of Alabama 1940, does not violate any provisions of the Constitution of Alabama 1901, nor does it violate the 14th Amendment of the Constitution of the United States.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of April 7, 1948, is as follows:

"Re: National Guard Post Exchanges or Canteens

"There are, as you know, quite a few post exchanges or canteens which are owned and operated by National Guard units in the State of Alabama. A question has arisen with respect to the liability of such post exchanges or canteens to the State of Alabama for the payment of tobacco and gasoline tax. Title 51, Sections 718, et seq., Code of Alabama 1940, as amended, levies the tobacco tax. Section 718, as amended, (General Acts 1945, page 528, approved July 7, 1945), levies the tobacco tax and employs language as follows:

" 'In addition to all other taxes of every kind now imposed by law and which are not specifically repealed by this sub-division, every person, firm, corporation, club or association, within the State of Alabama, who sells or stores or receives for the purpose of distribution to any person, firm, corporation, club or association within the State of Alabama, cigars, cheroots, stogies, cigarettes, smoking tobacco, chewing tobacco, snuff, or any substitute therefor, either or all, shall pay to the State of Alabama for state purposes only a license or privilege tax * * * *. There is hereby levied license or privilege taxes on aritcles containing tobacco enumerated in this subdivision the following amounts: * * *.'

"It will be noted that this levying section is broad enough to cover every person, corporation, partnership or association, including Natoinal Guard post exchanges or canteens. It will also be noted that Section 729, Title 51, was amended by the Legislature in 1943 as appears from Acts of 1943, page 446, approved July 10, 1943. This section, as amended, is the only section which provides for the exemption of certain sales from the tobacco tax levy. Said section

specifically provides that a wholesaler or jobber may sell such products without Alabama Revenue Stamp affixed thereto, provided such products are sold and shipped or delivered in interstate commerce to a person outside of the State and provided further such wholesaler or jobber complied with certain other regulations therein provided; and said section also provides that such tobacco products may be sold by wholesalers or jobbers without Revenue Stamps affixed thereto when sold to the United States or to any instrumentality thereof for resale to or for use or consumption by members of the Armed Services of the United States and also such wholesalers or jobbers may sell such tobacco products without Revenue Stamps affixed thereto when sold to ships regularly engaged in foreign commerce or coastwise shipping between points in this State and points outside of this State for resale to or consumption upon such ship or in foreign commerce. No further exemption appears to have been provided by said section which, as noted above, was amended by the Legislature of 1943.

"The gasoline tax is levied by Title 51, Sections 646-665. It will be noted that Section 647, as ultimately amended by the Legislature of 1945, (General Acts 1945, page 590, approved July 2, 1945), levies the gasoline tax upon every distributor, refiner, retail dealer, or storer of gasoline, said levying section using the following language.

" 'Every distributor, refiner, retail dealer, or storer for gasoline shall pay to the state department of revenue an excise tax of six cents per gallon upon the selling, distributing, storing or withdrawal from storage in this State for any use, gasoline, as defined by Article 5, Title 51, Code of Alabama 1940.'

"It will be noted that said section provides for only one exemption from the payment of said tax and that is when such gasoline is sold to, and paid for by, the United States. Section 648, as amended by the Legislature of 1945, (General Acts 1945, page 580, approved July 6, 1945), also provides to whom an excise tax should be applicable as follows:

" 'The excise tax imposed by section 647 of this title shall apply to **persons** as defined in this article, storing gasoline and distributing the same or allowing the same to be withdrawn from storage whether such withdrawals be for sale or other use; * * *.' (Emphasis ours.)

"For a definition of persons we have to go to Section 646 of said title wherein the word 'person' is defined as follows:

" 'The word "person" means and includes persons, corporations, co-partnerships, companies, counties, municipal corporations, school boards, or agencies of the state, or other agencies, associations, incorporated or otherwise, singular or plural.'

"It will be noted that the term 'person' as defined by said section is very broad and even includes counties, municipal corporation, school boards, and agencies of the State and is quite broad enough to include National Guard post exchanges or canteens. As noted, the gasoline tax law provides for no exemption from the payment of the gasoline tax except sales made to, and paid for by, the United States.

"Title 35, Sections 1 to 185, inclusive, Code of Alabama 1940, provided for the creation of the Alabama National Guard and Naval Militia. Section 110 of said title is as follows:

" 'All post exchanges, or canteens owned, operated, and run exclusively by national guard units shall be exempt from the payment of all state, county, city or town licenses and taxes, and shall be exempt from the payment of tobacco and gasoline tax to state, county, city or town when operated in accordance with such rules and regulations as the adjutant general may provide and the governor may approve, when the profits of such canteens or exchanges go to the national guard or naval militia units and not to the operators of such enterprises.'

"We direct your particular attention to that part of said section dealing with 'tobacco and gasoline tax to the State.'

"We desire your official opinion with respect to the following:

"1. Is said Section 110, Title 35, in conflict with (a) the sections referred to above levying the tobacco tax and (b) the sections above referred to levying the gasoline tax; and, if so, which shall prime the other?

"2. Does the fact that the Legislature amended (a) the Tobacco Tax Law and (b) the Gasoline Tax Law subsequent to the effective date of the Code of Alabama 1940 without embracing in the exemptions from the tobacco tax or the gasoline tax sales of such products to Alabama National Guard post exchanges or canteens affect the question of which law takes priority, it being noted that Section 110 of Title 35 has not been amended subsequent to the effective date of the Code?

"3. Does Section 110 of Title 35 provide for an absolute exemption from payment of tobacco and gasoline tax to the State or is there some condition which the post exchange or canteen must comply with before being entitled to said exemption and what, in particular, are such conditions with which said post exchange or canteen must comply?

"4. Does not said Section 110 of Title 35, insofar as it attempts to exempt post exchanges or canteens from the payment of tobacco and gasoline tax, conflict with the Fourteenth Amendment of the

Federal Constitution as well as with similar provisions of the State Constitution?

"5. Should you hold that the post exchange is exempt from gasoline and tobacco taxes, must the post exchange be operated under rules and regulations of the Adjutant General approved by the Governor or must it be operated as an instrumentality of the Federal Government covering operations of post exchanges as set out in Army Regulation No. 210-65?

"I shall greatly appreciate it if you will advise me as promptly as you reasonably can with respect to the above and with respect to the procedure which the Department of Revenue should follow with respect to the collection **vel non** of tobacco and gasoline tax from either the post exchanges direct or from the vendors of such products to said post exchanges or canteens."

The tax exemption statute (Title 35, Section 110, Code of Alabama 1940) quoted in your inquiry and applicable to post exchanges or canteens owned, operated and run exclusively for national guard units was enacted by the Legislature in 1931, (Act No. 603, General Acts 1931, page 687, Section 103). It was repealed in 1935 when the Legislature, then in session, incorporated in Act No. 194, providing for the general revenue of Alabama (General Acts of Alabama, page 256), Section 368½, (page 564) reading as follows:

"§368½.—The exceptions and exemptions from license or privilege taxes levied by this Act which are granted by this Act, are hereby declared to be exclusive, and any laws or parts of laws general, local or special, granting or attempting to grant any exceptions or exemptions, except as specifically granted herein are specifically repealed."

An examination of Act No. 194, of which said section 368½ is a part, reveals that said tax exemption law, granting exemptions to post exchanges and canteens was not included.

The Code Committee, in compiling the 1940 Code, incorporated the exemption act in the Code of Alabama 1940 where it appears as Title 35, Section 110. Section 368½, supra, was omitted from the 1940 Code. With the enactment of the 1940 Code the exemption act again became law in Alabama.

The right of the Legislature to grant tax exemptions has been approved time and again.

"Unless restricted by express or implied constitutional provisions, power to exempt from taxation is as much a legislative prerogative as the power to tax, and in both respects the Constitution is restrictive in operation and not permissive." **State v. Alabama Educational Foundation, 163 So. 527, 231 Ala. 11.**

"The State may exempt such property as it sees fit so long as no arbitrary classifications result." **Lee v. State Tax Commission of Alabama,** 123 So. 6, 219 Ala. 513.

I know of no constitutional provision in Alabama that operates to restrict or nullify this tax exemption statute, nor does the statute conflict with the 14th Amendment to the Constitution.

The intent of the Legislature to grant the exemptions set forth in Section 110, supra, is not, in my judgment, refuted by the presence in Title 51, Section 647, Code of Alabama 1940, as amended by the Legislature in 1945 (General Acts 1945, page 590, approved July 6, 1945) of certain specific exemptions without including an exemption as to post exchanges or canteens. It might be said that the Legislature took cognizance of the exemptions already in the Code and saw no need of again writing it into law. In my judgment the rule **inclusio unius est exclusio alterius**—the inclusion of one is the exclusion of the other—does not have application in this case. This maxim expresses a rule of statutory construction and serves only as an aid in discovering legislative intent where such intent is not otherwise manifest. **Garrison v. City of Shreveport,** 154 So. 622, 179 So. 605. "The maxim has its exceptions * * * one of which is that, when there is a reason for mentioning one thing and not the other, the absence of any mention of the latter will not be considered as an exclusion." **Parks v. Commission,** 22 Colo. 86, 43 P. 542, 545. There was no reason for again mentioning exemptions to canteens and post exchanges since they had already been exempted. The intention of the Legislature to grant the exemption is manifest.

Addressing your questions seriatim I conclude as follows:

(1). Title 35, Section 110, Code of Alabama 1940, granting certain tax exemptions, conflicts with the statute levying State tobacco and gasoline privilege and excise taxes. The exemption prevails.

(2). The subsequent amendment by the Legislature of the statutes levying the gasoline and tobacco privilege and excise taxes without embracing therein any exemption to post exchanges and canteens from the payment of said taxes does not, in my judgment, affect or repeal the specific exemptions contained in said Title 35, Section 110, supra.

(3). Title 35, Section 110, supra, in my judgment, provides for an absolute exemption from the payment of gasoline and tobacco privilege and excise taxes to the State, but must be granted or obtained under such rules and regulations as the Adjutant General, with the approval of the Governor, may provide. These rules and regulations may limit the quantity of tax exempt tobacco or gasoline that may be sold to any member of the national guard, and may define the conditions of sale, or may prohibit sales altogether to any such members. The sales that are made shall be exempt, but there is no legal mandate to make any sales.

(4). Said Section 110, supra, does not conflict with the 14th Amendment to the Constitution of the United States.

(5). In my judgment, the canteens and post exchanges so exempted from the payment of State gasoline and tobacco excise and privilege taxes must be operated under rules and regulations promulgated by the Adjutant General, approved by the Governor, but not necessarily operated as an instrumentality of the Federal Government as set out in Army regulations.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 12, 1948.

Hon. Frank O. Deese,
Judge of Probate, Dale County,
Ozark, Alabama.

Schools—Counties.

The county governing body is authorized to appropriate general funds of the county under the provisions of Title 52, Section 207, Code of Alabama 1940, to aid public high schools in the purchase of musical instruments for bands.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of May 6, 1948, is as follows:

"The Dale County High School located here in Ozark, is interested in organizing a band for the use of the school and for public entertainment of the people of the county. The civic organizations of Ozark are contributing funds toward the purchase of the necessary musical instruments for use of the proposed band. When organized, and the instruments are purchased, it is proposed that they remain in the custody and become the property of the Dale County High School.

"The Court of County Commissioners has been requested to make an appropriation of county funds to assist in the purchase of the necessary instruments. I am not just clear whether we have the legal authority to appropriate county funds for this purpose. I will appreciate your official opinion on this point."

You are advised that the Court of County Commissioners of Dale County is authorized to make an appropriation out of the general fund

of the county to assist the Dale County High School in purchasing musical instruments.

As stated in your inquiry, these instruments, when purchased, will become the property of the Dale County High School. Under such circumstances, the county governing body, under the provisions of Title 52, Section 207, Code of Alabama 1940, is authorized to make such contribution.

We have heretofore held that county funds may be expended to finance cafeteria projects operated by the public schools, Quarterly Report of Attorney General, Vol. 21, page 49; that athletic equipment may be purchased for schools by the county governing body, Biennial Report of Attorney General, 1936-38, page 3; and that the county may expend funds for improving lighting facilities in public schools, Quarterly Report of Attorney General, Vol. 40, page 9.

We have further held that school funds, as distinguished from the county general fund, may be used for the purchase of lunchroom equipment, Quarterly Report of Attorney General, Vol. 41, page 27; professional magazines, Quarterly Report of Attorney General, Vol. 11, page 67; but not band uniforms, Quarterly Report of Attorney General, Vol. 28, page 171.

In an opinion of this office rendered September 27, 1937, we held that school funds could be used to purchase musical instruments. Quarterly Report of Attorney General, Vol. 8, page 320.

I cite the above opinions merely to indicate the various articles which we have held may be purchased out of school funds and out of county funds for the use of the schools.

In its discretion, therefore, the county governing body may make the appropriation referred to.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 13, 1948.

Honorable Thomas W. Jones,
Judge of Probate,
Madison County,
Huntsville, Alabama.

Elections—Voting Machines—Candidates.

In those counties in which voting machines are used it is not required that the names of the candidates be alternated in

position as provided by Title 17, Section 344, Code of Alabama 1940.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of March 24, 1948, is as follows:

"Voting Machines, Title 17, Sec. 344.

"Do the provisions of this section regarding the alternating in position of the names of certain candidates upon the ballots, apply in printing ballots when voting machines are used?"

My answer to your inquiry is in the negative.

Your attention is called to the fact that Title 17, Section 344, Code of Alabama 1940, the section requiring the names of candidates to be voted upon in primary elections to be alternated in position where such person is a candidate for a national or state office to be voted upon by the voters of more than one county, appears in Chapter 2, Article 1, Title 17, Code of Alabama 1940, which said chapter is dealing with the laws applicable to primary elections.

The only contention which could possibly be made that this section is applicable to those elections in which voting machines are used grows out of the provisions of Title 17, Section 119, which reads as follows:

"§119. Application of other laws.—The provisions of all other laws relating to the conduct of elections shall, **so far as practicable,** apply to the conduct of elections where voting machines are used, unless herein otherwise provided."

We, therefore, must determine whether or not it is practicable to alternate the names of candidates in those elections in which voting machines are used.

Title 17, Section 101, Code of Alabama 1940, reads, in part, as follows:

"§ 101. Preparation of voting machines.—* * * * * * It shall be the duty of the sheriff in all elections which the county is charged with the expense of, the duty of the city clerk in a city election, the duty of the president of a school board in school elections, and the duty of the authority holding other elections of any character, to have delivered a voting machine, or machines, together with an instruction model for each machine, showing a portion of the face of such machine in use at such election, to each and every polling place where same is required by law to be used, at least one hour

before the time set for the opening of the polls in such voting precinct. * * * * *."

The above excerpt from Section 101 requires that it shall be the duty of the sheriff and certain other persons to place an instruction model of each voting machine to be used in an election, showing a portion of the face of such machine, the position of the names of the candidates and just how that machine is set up for actual voting. Let us suppose that the instruction model which is required to be placed at each voting place did not correspond with the machine to be used at that voting place insofar as the position of the candidates for office are concerned. It can readily be seen that it would be absolutely useless and confusing to require this model for the instruction of voters to be displayed if the machine itself did not correspond to the model.

Title 17, Section 102, Code of Alabama 1940, provides, in pertinent part as follows:

"* * * * * * The election officials shall cause to be conspicuously placed the sample ballots and model for the guidance of the voters. * * * * * * *"

This provision of this section unquestionably contemplates that the sample ballot and model to be placed by the election officials for the guidance of voters should correspond to the machine which will actually be used in the election. Here again we see this would lead to confusion if the names of the candidates on the machine to be used were alternated and those on the sample ballot for the guidance of voters were not.

Title 17, Section 104, Code of Alabama 1940, provides, in pertinent part, as follows:

"* * * * * * The lantern, or proper substitute therefor, shall be prepared and in good order for use before the opening of the polls. A model and two diagrams or sample ballots, of suitable size, representing such part of the face of such voting machine as will be in use in the election, and accompanied by directions for voting on the machine. Such diagram shall be posted, prominently outside, for the instruction of electors. Such model shall be placed in the polling place and at or outside of the guard-rail or barrier. * * * * * *"

As pointed out hereinabove in regard to the pertinent parts of Sections 101 and 102, supra, that unless the model machine, the diagrams and the sample ballots correspond to the machine to be used in the election their display would lead to confusion and in some instances to inaccurate instructions to the voters.

Title 17, Section 106, Code of Alabama 1940, reads, in pertinent part, as follows:

"During the thirty days next preceding an election, the city commission in municipal elections, and the county board in all other elections, shall place on public exhibition, in such public places and at such times as it may deem most suitable for the information and instruction of the voters, one or more voting machines, containing the ballot labels, and showing the offices and questions to be voted upon, the names and arrangements of parties, and, so far as practicable, the names and arrangements of the candidates to be voted for. Such machine or machines shall be under the charge and care of a person competent as custodian and instructor. * * * * *"

This section provides in no uncertain terms that during thirty days preceding an election the person charged with holding the election shall properly display for the information and instruction of voters one or more voting machines showing the arrangements of the names of candidates to be voted on and in every detail just how the machine will be set up for actual voting. If this instruction machine were not set up and the names of the candidates did not appear in the same order as the names of the candidates on the machine to be actually used in the election, here again we see that in all probability many voters would be mislead and misinstructed in the use of voting machines.

From a reading and consideration of the above referred to code sections, it is my opinion that to alternate the names of candidates in those elections in which voting machines are used would only lead to confusion and misunderstanding. Therefore, you are advised that, in my judgment, it is not practicable to alternate the names of candidates in those elections in which voting machines are used as required by Section 344, supra, and Section 119, supra, has no application insofar as this question is concerned.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 13, 1948.

Hon. Emmett Perry,
Circuit Solicitor,
Tenth Judicial Circuit,
Jefferson County,
Birmingham 3, Alabama.

Elections—Absentee Ballots.

1. Under presently applicable statutory provisions, absentee ballots may not be counted until the polls are closed.

2. However, the counting of such ballots before the polls are closed does not constitute an offense cognizable under the statutory law of this State unless the same was done with a

willful intent to violate the applicable statutory provisions as to the time for counting the same.

3. The counting of absentee ballots before the polls are closed is a mere irregularity insofar as the legality of said ballots is concerned and does not render the same illegal, provided they are otherwise legal.

4. Opinion in Quarterly Report of Attorney General, Vol. 11, page 26, and Biennial Report of Attorney General, 1936-38, page 614, withdrawn as no longer applicable.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of May 6, 1948, is as follows:

"On Tuesday, May 4th, 1948 about 3:30 P. M., I, as Solicitor of the Tenth Judicial Circuit of Alabama, received a telephone call from Honorable James E. Folsom, Governor of Alabama, calling my attention to the following facts:

"Local newspapers had given publicity to the results of a partial count, which was then continuing, of the absentee votes cast in Jefferson County, Alabama; that the election officials, appointed in accordance with Title 17, paragraph 64 (6), Code of Alabama 1940 (Acts 1945, page 712, paragraph 5, approved July 7, 1945) were then and there, in a room adjoining the courtroom of the Probate Judge of Jefferson County, Alabama, proceeding to count said absentee ballots; that such count had been proceeding since before noon of said date; that newspaper reporters and the general public were present in the room where said count was being made and the partial results were open to the public; that the partial results were public information to such newspaper reporters; that thereupon, several hours before the time for closing polls generally, said partial results had been given prominent publicity in the local daily press. The Governor directed the undersigned solicitor to enforce the election laws in this respect, calling attention to the fact that, in his opinion, such votes should not be counted nor should the results, partial or complete, be made public until the hour of six o'clock which by Title 17, Section 192 should not be counted 'until the polls are closed.'

"For convenient reference said Title 17, Section 192 is here quoted:

" 'All inspectors of elections in the election precincts shall, immediately on the closing of the polls, count the votes polled, and no votes shall be counted until the polls are closed.'

"Attention was further called to Title 17, Section 64 (7), Code of Alabama 1940 as amended (Acts 1945, page 713, paragraph 6, approved July 7, 1945). Said section directs as to 'How ballot cast by absent voter' and after preliminary statement concludes with the following sentence: 'All votes found to be **legal votes shall be handled in all respects as if the absentee voter were present and voting in person** and the official shall, after it has passed upon and counted the votes, make a certificate of results as to the number of absentee votes received for each candidate whose name is on the ballot, which certificate shall be signed and forwarded forthwith to the person or persons authorized by law to receive the same for canvassing the returns of the election.' (Emphasis supplied).

"On the same date of May 4th, 1948 the Governor of Alabama directed to the undersigned solicitor a letter in words and figures as follows:

"STATE OF ALABAMA
"Executive Office
"Montgomery
"May 4, 1948

"Honorable Emmett Perry
Solicitor Jefferson County
Birmingham, Alabama

"Dear Sir:

"It has been brought to my attention that in today's Primary Election, in some of the boxes in Jefferson County, absentee ballots were counted and the results divulged before the closing of the polls.

"Please have this matter investigated by a grand jury.

"With kindest regards and best wishes, I am

"Yours very truly,

"S/ James E. Folsom
JAMES E. FOLSOM, Governor.

"jef: p

"The undersigned, in compliance with said request of Chief Executive, called attention of said election officials to the laws above set out in the presence of many persons, officials and otherwise, who were then and there watching the count as it proceeded. Immediately thereupon, said election officials ceased to count said votes until after the legal hour of closing (so we are informed) and concluded the count after 6 P. M. It was obvious from statements of the officials present that they were not cognizant of any law which prevented them from counting said votes prior to 6 P. M.

"Further investigation of the law by the undersigned discloses the opinion of the present Attorney General of Alabama, who was then Attorney General, under date of April 25, 1938 contained in 'Biennial Report Attorney General Alabama' October 1, 1936 to September 30, 1938, pages 614-616, inclusive. Honorable Holt McDowell, Sheriff of Jefferson County and Chairman of the Democratic Executive Committee of Jefferson County, called attention to said opinion. Is that said opinion by the Attorney General applicable to the situation described above? Said opinion is a construction of 'Act No. 178, **General Acts,** 1933, page 193, approved April 19, 1933, sections 5 and 6, and a construction of 'section 503 of the Code of Alabama of 1923' and a construction of sections 25 and 26, Act No. 56, General Acts 1931, page 73, approved February 25th, 1931.'

"Attention is called to the fact that the laws being construed in the said former opinion of the Attorney General relates to laws passed during the years 1931 and 1933 and laws existing in the Code of Alabama of 1923.

"Attention is further specifically directed to the fact that the present law was passed and approved in the year 1945.

"Upon the basis of the foregoing the following questions arise, the answers to which are material to requesting an investigation and the immediate answer to which are of great public importance since the run-off election is to be held on Tuesday, June 1st, 1948.

"1. Does said Title 17, Section 64 (7) repeal the former laws upon this subject, said laws being construed in said former opinion of the Attorney General?

"2. Is said Title 17, Section 64 (7) applicable to elections held on May 4th, 1948 and to be held on June 1st, 1948?

"3. Do the words appearing in said Section 64, 'All votes found to be legal votes shall be handled in all respects as if the absentee voter were present and voting in person,' mean that such votes shall be counted as all other votes of persons who voted in the regular manner at the voting places?

"4. Does Section 192, Title 17, Code of Alabama 1940, wherein it provides 'no votes shall be counted until the polls are closed' apply to absentee votes cast in accordance with the law governing absentee voting?

"5. Does the fact that it has been customary for such count of the absentee votes to be made prior to 6 P. M. have the effect of authorizing or permitting election officials,, in charge of counting absentee votes, to make such count prior to the closing of the polls at 6 P. M. in incorporated cities?

"6. Is the counting of such votes an offense cognizable under Section 64, Title 17, Code of Alabama 1940 as amended or an offense against any other existing law?

"7. Does the fact that said votes were counted, in part, prior to 6 P. M. vitiate said count in that the results thereof are in any manner illegal? Should said votes be counted as legal votes in determining the results of said election? Should the number of said votes so counted illegally (if said count be illegal) be deducted from the announced results of said election?

"The response of the Attorney General to the foregoing question is desired by the election officials of the Democratic Executive Committee as well as other officials mentioned herein. The answer thereto as early as convenient and before the next election on June 1st, 1948 is of vital importance to the authorities.

"Incidentally, the results of absentee voting in other counties was given newspaper publication prior to the closing of the polls in those counties and, therefore, your answer to these questions, it is thought, is of state-wide importance."

At the outset, I deem it advisable to point out that the entire statutory law of this State governing the subject of absentee voting in all primary, general, and municipal elections is contained in Act No. 478, General Acts 1945, page 711 (Title 17, Sections 64(1)-64(14), 1945 Cumulative Pocket Part, Code of Alabama 1940), all other statutory provisions governing the subject of absentee voting in all elections having been specifically repealed by Act No. 408, General Acts 1945, page 645.

Sections 5 and 6 of Act No. 478, supra, read in pertinent part, respectively, as follows:

"For all future primary, general, or municipal elections in addition to the managers and clerks now provided for under the laws of this State for conducting elections, there shall be appointed by the appointing board of the county or city three managers, two clerks, and a returning officer who shall meet in the office of the judge of probate of the county, or in a place to be designated by the appointing board, on the day of the election for the purpose of receiving the ballots of absentee voters from the judge of probate or other person authorized to handle the same as provided for herein: * * *"

"* * * The official receiving the ballot shall endorse on the envelope over his signature, which shall be written across the sealed portion of the envelope, the date and hour of the receipt thereof by him; he shall safely keep the ballot without breaking the seal of the envelope and deliver the same on election day to the election officials appointed for the purpose of counting such votes. If the name of such absentee voter appears on the official list of qualified

voters of the county, and if the envelope containing the absentee vote was postmarked or marked received by the proper official not less than five days prior to election day, the election officers shall check his name off the official voting list and cause the ballot to be duly and properly recorded. **All votes found to be legal votes shall be handled in all respects as if the absentee voter were present and voting in person** and the official shall, after it has passed upon and counted the votes, make a certificate of results as to the number of absentee votes received for each candidate whose name is on the ballot, which certificate shall be signed and forwarded forthwith to the person or persons authorized by law to receive the same for canvassing the returns of the election." (Emphasis Supplied.)

Construing the above quoted portions of Act No. 478, supra, and especially the part underscored, in connection with Title 17, Section 192, Code of Alabama 1940, which is set out in your letter of inquiry, and Title 17, Sections 362 and 363, Code of Alabama 1940, it is my opinion that absentee ballots may not now be counted until the polls are closed.

Under Title 17, Section 172, Code of Alabama 1940, this means that absentee ballots may not be counted in cities and towns of over five thousand inhabitants until 6 P. M., inasmuch as the polls do not close in such cities and towns until that time.

The opinion to which you refer in your letter of inquiry, which is found in Quarterly Report of Attorney General, Vol. 11, page 26, and Biennial Report of Attorney General, 1936-38, page 614, was based entirely on the provisions of Sections 5 and 6 of Act No. 178, General Acts 1933, page 193 (Title 17, Sections 9 and 10,Code of Alabama 1940). However, as stated hereinabove, these Code sections have been specifically repealed. Consequently, that opinion, while correct at the time it was written, is no longer applicable.

In view of the above, it is unnecessary to answer categorically your questions numbered 1, 2, 3, and 4.

Your question numbered 5 must be answered in the negative. As pointed out above under the presently applicable statutory law of this State, absentee ballots may not be counted until the polls are closed (6 P. M. in cities and towns of over five thousand inhabitants). I know of no legal rule or principle by which custom may modify, alter, or annul the positive statutory law of this State.

I am unable to answer your question numbered 6 categorically, inasmuch as the answer to this question depends upon whether or not the counting of absentee ballots before the polls were closed, contrary to the statutory law of this State, was done willfully. Section 13 of Act No. 478, supra, contains criminal provisions for the enforcement of said act, and Subsection (c) thereof reads as follows:

"Any person who willfully violates any provision of this act for which a penalty is not otherwise provided, upon conviction, shall be punished by imprisonment in the county jail for not less than 30 days nor more than one year or in the State penitentiary for not less than one nor more than two years, or by fine of not less than $100.00 nor more than $1,000.00 or by both such fine and imprisonment."

There is no specific penalty provided for the counting of absentee ballots before the polls are closed. Consequently, Subsection (c) of Section 13, supra, would apply to such counting, provided the same was done with an intent willfully to violate the provisions of said act. However, from the facts stated by you in your inquiry as to the circumstances under which the officials of the absentee ballot box of Jefferson County began counting the absentee ballots before the polls were closed on May 4, 1948, it appears that such action was due to a mistake on their part as to the statutory law of this State in that regard and not to any willful intent to violate the same.

Under "7" you ask three questions. The first of these questions should be answered in the negative, the second of said questions should be answered in the affirmative, and the third of said questions should be answered in the negative. In support of the answers to these questions, I quote the pertinent part of a statement from Judge Freeman in 90 Am. St. Rep. 72, on the general conduct of elections, which was quoted with approval by the Supreme Court of Alabama in the case of **Garrett v. Cuninghame**, 211 Ala. 430, 100 So. 845:

" * * It is, therefore, very generally held that the provisions of a statute as to the manner of conducting the details of an election are not mandatory, but directory merely, and irregularities in conducting an election and counting the votes, not proceeding from any wrongful intent, and which deprive no legal voter of his vote, will not vitiate an election, or justify the rejection of the entire poll of a precinct. Behrensmeyer v. Kreitz, 135 Ill. 591, 26 N. E. 704; Hankey v. Bowman, 82 Minn. 328, 84 N. W. 1002; Bailey v. Hurst (Ky.) 68 S. W. 867. As a general rule, mere irregularities in conducting an election, which do not affect the final result, do not vitiate such election (Sprague v. Norway, 31 Cal. 173; Piatt v. People, 29 Ill. 54; Behrensmeyer v. Kreitz, 135 Ill. 591, 26 N. E. 704; Gass v. State, 34 Ind. 425; Irwin v. Lowe, 89 Ind. 540; Gilleland v. Schuyler, 9 Kan. 569; Napier v. Cornett (Ky.) 68 S. W. 1076, Webre v. Wilton, 29 La. Ann. 610; People v. Cook, 8 N. Y. 67, 59 Am. Dec. 451; McKinney v. O'Connor, 26 Tex. 5; Loomis v. Jackson, 6 W. Va. 613), the election otherwise being fairly and honestly conducted, and no legal voter is deprived of his franchise, or illegal votes received. * * *"

See also **Pope v. Howle**, 227 Ala. 154, 149 So. 222, and **Ex parte Bullen**, 236 Ala. 56, 181 So. 498.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 13, 1948.

Hon. John E. Mandeville,
Clerk, Circuit Court,
Mobile County,
Mobile, Alabama.

Employees' Retirement System—Counties—Mobile County.

Under Section 12 of Act No. 515, General Acts 1945, page 734, as amended by Section 5 of Act No. 606, General Acts 1947, page 445, persons appointed or employed by individual officers and performing their duties in public offices in Mobile County are "officers" and "employees" of the county as those terms are used in said act, and such persons have the same status and are entitled to the same benefits under the Employees' Retirement System as any and all other officers and employees of Mobile County.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of January 5, 1948, is as follows:

"By Act No. 606, Approved October 13, 1947, the last Legislature of Alabama amended the **'Employees Retirement Act of 1945.'** Thereby, Section 12 of the Employees Retirement Act of 1945, which applies to the participation of counties in the retirement system, was amended by including therein the following:

" 'The terms "officers" and "employees" as herein used shall include those persons appointed or employed by individual officers and performing their duties in public offices.'

"I am informed by a member of our Mobile County Legislative Delegation that this definition was added to this Section 12 of said Employees Retirement Act of 1945, for the purpose of removing any doubt as to the eligibility of county employees to receive full credit for prior service even though they had been employed and paid by an individual public fee officer.

"Also I am informed that this amendment was checked by Mr. Screws and Mr. McQueen of the Attorney General's Office, and that the proposers of said amendment were assured by those two members of the Attorney General's Office that Section 12, as so amended, would remove any doubt as to county employees, who were formerly working for a fee officer under the fee system, receiving full prior credit for their service with the County and under the Employees Retirement Act of 1945.

"The Board of Revenue and Road Commissioners of Mobile County have decided or ruled that an employee of Mobile County who, during any portion of his service with the County was employed by and paid by a public fee officer or individual fee officer, is not entitled to credit, under the Employees Retirement Act of 1945, as amended by Act No. 606, Approved October 13, 1947, for those years they were so employed and paid by an individual fee officer, even though such employees were performing services relating to the duties of said fee officer as prescribed by Law pertaining to his duties as a Public Officer.

"I have several clerks in this office who are in this category, and therefore request an official opinion from you on this matter."

Under Subsection (1) of Section 12 of Act No. 515, General Acts 1945, page 734, which act created the Employees' Retirement System of Alabama, the governing board of any county, by resolution legally adopted to conform to rules prescribed by the board of control, could elect to have its officers and employees, from whatever sources and in whatever manner paid, become eligible to participate in the Employees' Retirement System. In the event of such election, Section 12 of said act governed the manner of participation by a county and the employees thereof.

By Act No. 187, Local Acts 1945, page 103, the governing board of Mobile County was required to adopt such resolution or take such action as was necessary to accomplish participation in the Employees' Retirement System as provided by Section 12, supra, within one year after the adoption and approval of Act No. 515, supra.

In 1947, the Legislature of Alabama, by Section 5 of Act No. 606, General Acts 1947, page 445, amended Section 12 of Act No. 515, supra, the only material change made by the amendment being the addition of the following in Subsection (1) thereof:

"The terms 'officers' and 'employees' as herein used shall include those persons appointed or employed by individual officers and performing their duties in public offices."

The only possible effect of such amendment was to include within the terms "officers" and "employees" as therein used "those persons appointed or employed by individual officers and performing their duties in public offices," if they were not already included within such terms. As applied to Mobile County, its only effect is to include as officers and employees of Mobile County those persons appointed or employed by individual officers and performing their duties in public offices in Mobile County, even though such individual officers might have been, may now be, or may hereafter be compensated on a fee basis rather than on a salary basis, and such employees may have received, may now receive, or may hereafter receive their compensation from the individual officer by whom they were, are, or may be employed rather than being paid from the treasury of Mobile County.

Premises considered, it is my opinion that such persons are officers and employees of Mobile County within the purview of Section 12 of Act No. 515, as amended, supra, just as are officers and employees of Mobile County who are paid from the treasury of said county, and that they have exactly the same status and are entitled to the same benefits under the Employees' Retirement System as the officers and employees of Mobile County who are paid from the treasury of said county.

It necessarily follows that the action of the Board of Revenue and Road Commissioners of Mobile County referred to in your letter of inquiry was erroneous.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 13, 1948.

Hon. John E. Mandeville,
Clerk, Circuit Court,
Mobile County,
Mobile 15, Alabama.

Appeals—Clerks of Circuit Court—Records—Court Reporters.

1. The matter of the abolition of bills of exceptions, and the filing of transcripts of evidence in lieu thereof, is governed by Act No. 461, General Acts 1943, page 423, and Supreme Court Rule 48, as Act No. 352, General Acts 1945, page 567, purporting to amend the 1943 Act, has been declared inoperative and void by the Supreme Court of Alabama.

2. A certified transcript of evidence is filed by the reporter with the clerk within seventy (70) days, and trial judge approves same within ninety (90) days, from date of trial or date on which motion for a new trial shall have been acted upon by the trial court. Objections to certified transcript are filed within ten (10) days after the seventy (70) days.

3. The transcript of evidence is copied in the clerk's transcript in lieu of the former bill of exceptions, and not inserted therein.

4. In cases where Clerk's transcript was prepared in accordance with the 1945 Act, supra, before the same was declared invalid, and costs assessed and collected thereunder, there would be no liability against the Clerk, or his official bond, under Title 41, Section 58, Code of Alabama 1940.

5. Opinion in Quarterly Report of Attorney General, Volume 46, page 5, withdrawn.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of January 28, 1948, is as follows:

"In view of the recent decision handed down by the Alabama Supreme Court in the case of Dewrell vs. Kearley appealed from the Circuit Court of Covington County, Alabama, which said decision ruled the 1945 Amended Act Abolishing Bills of Exceptions as "Void and inconsistent and unworkable," and ruling that the 1943 Act Abolishing Bills of Exceptions and Rule 48 Supreme Court of Alabama as remaining in force and effect, I would like to have a ruling from your office on the following questions pertaining to the 1943 Act and Rule 48 of the Supreme Court:

"1. Is the Trial Judge in the Circuit Court required to Approve the Stenographer's transcript of evidence required by the 1943 Act Abolishing Bills of Exception and by Rule 48 of the Supreme Court of Alabama within seventy (70) days from the date of trial or ruling on motion for new trial, or, does the Trial Judge have a total of ninety (90) days within which to approve the Stenographer's transcript of evidence?

"2. Is the Trial Judge required to endorse his ruling on hearing of objections, filed by either party to the stenographer's transcript, on the stenographer's transcript of evidence, or, does the Trial Judge endorse his ruling on hearing of objections, filed by either party to the stenographer's transcript of evidence, on the transcript of the stenographer of the evidence at the hearing of objections?

"3. Is the stenographer required to make up a certified transcript of the evidence upon hearing of objections, filed by either party, separate and apart from his original transcript of the evidence had at the trial, or, does the stenographer add his transcript of the evidence upon hearing of objections to his original transcript of the evidence had at the trial?

"4. In considering the provisions of the 1943 Act Abolishing Bills of Exceptions, and Rule 48 of the Supreme Court of Alabama, can the court reporter transcript the evidence of the trial on transcript paper, making original and two carbons, and file all three copies with the Clerk? And in that event can the Clerk insert this court reporter's transcript of evidence in to the Clerk's transcript on Appeal, thereby eliminating the necessity of copying the court reporter's transcript in to the Clerk's transcript on appeal?

"5. In the event you rule that the answer to question number four (4) above is in the affirmative, then, and in that event can the Clerk eliminate the charge, in his bill of costs, for copying said

court reporter's transcript of evidence in to the Clerk's transcript on appeal?

"As there are urgent needs for the above questions to be answered by your office, and all Clerks, Judges and Court Reporters in the State are interested parties also, I ask that you do all possible to render an immediate opinion on the above questions of Law."

In the recent case of **Dewrell v. Kearley,** (Ala. Sup. Ct.), 32 So. 2d 812, decided November 28, 1947, it was held that Act No. 352, General Acts 1945, page 567, purporting to amend Act No. 461, General Acts 1943, page 423, was inoperative and void. The result of this decision, as stated in the opinion of the Court, is that the matter of the abolition of bills of exception, and the filing of transcripts of evidence in lieu thereof, is to be governed by the original 1943 Act, supra, and Supreme Court Rule 48, adopted June 28, 1944, (Title 7, Code of Alabama 1940, 1945 Cumulative Pocket Part, page 89). In other words, the situation reverted to the status quo as of the date of the adoption of Supreme Court Rule 48, supra.

For a better understanding of the inquiries presented in your letter, I deem it expedient to set out in full both the original 1943 Act, supra, and Supreme Court Rule 48, supra. The 1943 Act, supra, reads as follows:

"Section 1. That bills of exceptions in the trial of cases at law in the circuit court and courts of like jurisdiction and all other Courts of Record having a full time Court Reporter and from which appeals lie directly to the Court of Appeals or the Supreme Court of Alabama in the State of Alabama are hereby abolished. If a party to a cause tried in such court desires to appeal from a judgment rendered he shall give notice to the court reporter that he desires to appeal and request the evidence to be transcribed. The court reporter shall then promptly transcribe the evidence, including objections, oral motions and rulings of the Court, certify to it and file it with the Clerk. He shall also identify and copy all exhibits offered in evidence in the order in which offered. The evidence so transcribed and certified and filed shall be a part of the record, and assignments of errors may be made as though the transcript constituted a bill of exceptions. If any exhibits be offered in evidence which the court reporter cannot copy, he shall at the appropriate place describe and identify them and certify that they cannot be copied, and such exhibits shall be forwarded to the appellate court and be considered along with the record. If either party to the cause deems the transcript so certified to be incorrect, the trial judge, upon request, shall hear the parties and make such corrections and additions as he may think proper.

"Section 2. Upon filing security for costs of appeal in any case at law the party desiring to appeal shall be entitled to have the court reporter transcribe the testimony as hereinabove provided, and

the court reporter's fees for transcribing and filing and certifying the testimony shall be taxed as a part of the costs of appeal as other costs of appeal are taxed and shall be paid in the same manner as other costs of appeal. If no security for costs of appeal is filed and approved, then the party demanding transcript of testimony from the court reporter shall pay the court reporter the usual fees therefor.

"Section 3. If the court reporter be deceased or for any other reason cannot transcribe the evidence, any party desiring to appeal, may, in lieu of it, present a succinct statement of the evidence, including objections, oral motions and rulings of the court, and furnish opposing counsel a copy. If objection be made thereto the trial judge shall hear the same and make such corrections in and additions to it as may be proper and shall approve the same as a transcript of the evidence. And any exhibits offered in evidence which cannot be copied in such statement shall be described and identified and forwarded to the appellate court, along with the record, for its consideration. Such statement, when approved by the trial judge, shall be a part of the record and assignments of error may be based upon any rulings shown in it.

"Section 4. The transcript of evidence or statement in lieu thereof shall be approved by the trial judge and filed with the Clerk within ninety days after date of trial or date of trial court's ruling on motion for new trial.

"Section 4½. The term 'court reporter' as used in this Bill shall mean any person who shall be received and accepted by the court during the trial of a case, with the duty to transcribe the testimony of witnesses in shorthand or stenotype notes for the purpose of preserving the testimony, whether such court reporter shall be an official reporter or not; any court reporter failing to transcribe and file testimony, pursuant to the terms of this Act, shall be subject to discipline on the part of the court as and for a contempt of the court, and in addition thereto be subject to a penalty of not more than $500.00, to be fixed by the trial judge and paid to the party aggrieved.

"Section 5. Motions for new trials shall be part of the record and, with the rulings thereon, included in transcript on appeal; and error may be assigned as to such rulings.

"Section 6. This Act shall become effective on September 1, 1943."

Supreme Court Rule 48, supra, reads as follows:

"48. CERTIFIED TRANSCRIPT OF EVIDENCE.—The party taking the appeal, and requesting a transcript of the evidence made and certified by the court reporter, in the exercise of reasonable

diligence, to comply therewith within a period of seventy days from the date of trial or date on which a motion for new trial shall have been acted upon by the court, and within said period the reporter shall perform the services required by section 1 of General Acts 1943, p. 423, codified as Title 7, § 827 (1), Cumulative Pocket Part, Code 1940.

"Upon filing the certified transcript with the clerk, the reporter shall also certify that he has notified both parties or their attorney of record that he has done so.

"Within ten days thereafter either party may file with the clerk objections to the certified transcript, with his certificate that he has notified the opposing party or attorney of record that the same will be called to the attention of the trial judge at a specified time and place. The hearing of objections and the ruling of the judge thereon shall all be concluded within a period of ninety days from the date of trial or the date of the ruling on motion for new trial.

"The trial judge shall endorse his ruling on the transcript, sign the same all within said ninety-day period. Any ruling of the trial judge upon such requested hearing, as well as any ruling on objections to a succinct statement, provided for in section 3 of General Acts 1943, p. 423, codified as Title 7, §827(3), shall be reviewable, with error duly assigned, by the dissatisfied party upon the appeal of the cause, and the evidence upon such hearing shall be duly certified by the court reporter.

"The certified transcript, though filed after the ninety-day period herein referred to but within the time for taking an appeal, will nevertheless be considered by the court if no objection thereto is presented upon the submission of the cause; and it may be so considered in the discretion of the court, even though the point as to the delay be presented on appeal, unless counsel objecting thereto shall point out, with supporting affidavit, material, omissions or defects in such certified transcript which should and would have been the subject of contest before the trial judge; in which latter event the certified transcript is not to be considered."

In answer to your first inquiry, it is my opinion that the trial judge has a total of ninety (90) days within which to approve the stenographer's transcript of evidence. Supreme Court Rule 48, supra, specifically so provides.

My understanding of the proper procedure in this respect, under Supreme Court Rule 48, supra, is as follows:

1. The transcript of evidence, certified by the reporter, should be filed with the clerk within seventy (70) days from the date of trial or

date on which the motion for a new trial shall have been acted upon by the trial court.

2. Then either party has ten (10) additional days within which to file objections to the certified transcript.

3. The hearing of the objections and the ruling of the trial judge thereon shall be concluded within a period of ninety (90) days from the date of the trial or the date of the ruling on the motion for a new trial.

In answer to your second and third inquiries, it is my opinion that evidence taken on the hearing of objections should be added to the original transcript of evidence at the trial, all of which is to be considered as one transcript. The trial judge endorses his ruling on said complete transcript under Supreme Court Rule 48, supra, and may make any such corrections and additions as he may think proper under the 1943 Act, supra.

I am of the opinion that your fourth inquiry should be answered in the negative.

Neither the 1943 Act, supra, nor Supreme Court Rule 48, supra, contains any provision requiring the reporter to prepare the transcript of evidence on transcript paper and make an original and two copies; nor do they make any provision for the insertion of same in the record to be prepared by the Clerk. These functions were new to the 1945 Act, supra, which was declared to be inoperative and void. Under the 1943 Act, supra, the Clerk's duties in relation to preparing transcripts for the appellate courts remained the same with the exception that the transcript of evidence was to be copied in the Clerk's transcript in lieu of the former bill of exceptions, and not inserted therein.—Quarterly Report of Attorney General, Volume 33, page 89.

The answer to your fourth inquiry pretermits an answer to your fifth inquiry.

However, for your benefit, and for the benefit of other Circuit Clerks of this State, I wish to make certain observations, as hereinafter set forth, in regard to situations that have arisen relative to the proper costs in cases where the Clerk's transcripts were prepared in accordance with the 1945 Act, supra.

After the date of the decision of the Supreme Court declaring the 1945 Act, supra, invalid, viz: November 28, 1947, the procedure set forth in answer to your fourth inquiry should be followed. In my judgment, the Clerk may not insert the reporter's transcript in his transcript and make a charge therefor.

In cases where the Clerk's transcript was prepared in accordance with the 1945 Act, before the same was declared invalid, and the re-

porter's transcript of the testimony was inserted in the Clerk's transcript and not copied therein by him, he could not charge a fee for copying same. An officer is not entitled to a fee unless he actually performs the services authorizing said fee. Also, the Clerk will not be entitled to the ten dollar fee authorized under the 1945 Act, supra, as the same has been declared invalid. However, it is my opinion that in those cases wherein the Clerk's transcript was prepared in accordance with the 1945 Act, supra, before the same was declared invalid, and costs assessed and collected thereunder, there would be no liability against the Clerk or his official bond. This protection is afforded by virtue of Title 41, Section 58, Code of Alabama 1940, which provides as follows:

> "§ 58. Officer paying and person receiving money paid under void law, not liable therefor.—When any state or county official shall have collected or paid out any money, as fees, salary or compensation for official services rendered under any law in Alabama, general or special, which law, be declared by the supreme court of Alabama to be unconstitutional or void or illegal, such officer shall not be liable, either individually or on his official bond, in any suit brought for the recovery of such money, so collected or paid out, nor shall the person to whom the same shall have been paid, be liable therefor."

An opinion by this office, reported in Quarterly Report of Attorney General, Volume 46, page 5, based on the 1945 Act, supra, is hereby withdrawn.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 14, 1948.

Hon. William A. Thompson, Mayor,
Town of Citronelle,
Citronelle, Alabama.

Municipalities—Appropriations.

Constitution of Alabama 1901, Section 94. A municipal corporation may not appropriate its funds to a private corporation or association for the purpose of erecting a swimming pool and other recreational facilities in the community.

Opinoin by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of January 29, 1948, is as follows:

"The Kiwanis Club in Citronelle have proposed to lease from the Town of Citronelle a plot of ground now used as a ball park for the school and town, and to put in a lighted field and swimming pool for the benefit of the public. They, of course, would charge something for the use of these privileges, at least enough to maintain them.

"They have asked the Town of Citronelle to appropriate $10,000 for the proposed $25,000 expenditure. The question arises, can we legally appropriate, or contribute, out of the town treasury, this, or any amount, for this purpose. We understand they will form a corporation and have a Board of Directors composed of five members of the Kiwanis Club, one member from the Town Council and one member from the Mobile County School Board, since part of the land they would use would be school property. This Board would operate the facilities.

"It will not be operated for profit, but for the general benefit of the public under the auspices of the Kiwanis Club.

"The Mayor and Councilmen feel that it is a worth-while undertaking and would be beneficial to the community.

"Thanking you for your opinion at an early date."

My answer to your inquiry is in the negative.

Your attention is directed to Constitution of Alabama 1901, Section 94, which reads as follows:

"§ 94. The legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation, whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise."

The Constitution and By Laws of the Memorial Park Association, Inc., Citronelle, Alabama, accompanying your request, plainly show that it is a private association or corporation and comes within the inhibition of Section 94, supra.

I, of course, realize that the public will be greatly benefited by the establishment of this recreational center. With reference to the anticipated public benefits to accrue to the city by reason of the establishment of this recreational center, I wish to quote from the **Southern Railway Company v. Hartshorne**, 162 Ala. 491, 50 So. 139:

"If the public benefits were held to be sufficient to take the act without the prohibition, then its ordaining in two Constitutions in this state was wholly vain. In the **Garland Case** a pecuniary liabil-

ity was attempted to be incurred. The same reason that forbade that course of procedure to aid private enterprises is present to condemn the diversion of public revenue in this instance. The provision is no more explicit against becoming a stockholder or affording credit by the issuance of bonds than it is that money shall not be granted. In all enterprises like railroads, canals, pikes, manufacturing establishments, etc., benefits naturally accrue to the community concerned, and it is common experience that this is true. Because it is true the trustees of government are and have always been amenable to it as an influence to induce the lending of the credit or granting the funds or property of the subordinate governments to the aid of such enterprises as foreshadow public benefits. This disposition, natural and inevitable of gratification if not restrained, cannot be gratified by those who have control. The very existence of this disposition has resulted in the creating of the prohibition. To permit it to yet prevail is to annul one of the wisest of the Constitution's provisions."

Your attention is also directed to the case of **Griffin v. Jeffers,** 221 Ala. 649, 130 So. 190. While this case deals with the right of a county to appropriate its funds, the following quotation is equally applicable to a municipal corporation appropriating its funds for like purposes:

"* * * * * these statutes contemplate that the power so conferred shall be exercised by the counties in their own names and rights, without entangling alliances with individuals or private corporations. * * * * * To construe these statutes as authorizing the contract here involved—clearly a loan of the county's credit to aid Kershaw and his associates to construct a privately owned toll bridge—would render them violative of the Constitution."

Citing Garland vs Board of Revenue of Montgomery Co., 87 Ala. 223, 6 So. 402.

I am of the opinion, therefore, that the City Council of Citronelle is not authorized to appropriate money for the erection of a recreational center to be under the management and control and erected by Memorial Park Association, Inc. To make such an appropriation would obviously violate Constitution of Alabama 1901, Section 94.

In this regard your attention is directed to the provisions of Act No. 350, General Acts 1945, page 565, which provides that the city itself may appropriate its funds to a recreational board created by the city.

The incorporation of the Memorial Park Association, Inc., was not under the provisions of Act No. 231, General Acts of 1947, p. 94. Therefore I pretermit an expression of opinion as to the right of the city to appropriate money to a corporation predicated on this Act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 14, 1948.

Hon. L. W. Brannen, Jr.,
Member of Legislature,
Baldwin County,
Bay Minette, Alabama.

Schools—Physical Education Programs—School Buses—Title 52, Section 555, Code of Alabama 1940.

Under Title 52, Section 555, Code of Alabama 1940, the County Board of Education of Baldwin County may use school buses for the purpose of transporting athletic teams from one place to another within the county and at times without the county, when in furtherance of the physical education program outlined by the department of education.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of April 21, 1948, is as follows:

"I request that you write me fully concerning the following matter:

"The school board of Baldwin County desires to use school buses for the purpose of transporting their athletic teams from one place to another within the county and at times without the county. The question of the legality of such procedure has arisen. I request that you go into the matter fully.

"Among other matters involved is the question of whether the school board has the right to loan one of the buses to a group of civic minded citizens who would be willing to assume full responsibility by way of indemnity, both as regards occupants of the bus and the bus itself.

"Let us suppose, for instance, half a dozen citizens and patrons of a school in Baldwin County should procure a loan of one of the buses with the distinct understanding that the bus was to be used for the purpose of transporting a baseball team from the school to some neighboring town.

"Let us suppose further that this group of citizens should procure an indemnity agreement from some reliable indemnity company providing for the payment of any damage to the occupants of the bus.

"In the first place, would the county board of education have the authority under the law to make loan of the bus for such purpose?

"Next, in the event there is no authority in law for the loan of such a bus for such purpose, and in the event, in spite of the law, the buses were loaned for such purposes and the indemnifying policy above mentioned should be taken out, do you see any objection to the group of citizens mentioned proceeding in this fashion?

"I shall appreciate it if you will give this matter your prompt attention to the end that I may advise the Superintendent of Education and County Board of Education fully in the premises."

Title 52, Section 555, Code of Alabama 1940, reads as follows:

"§555. Physical education required.—Every public school and private or parochial school shall carry out a system of physical education, the character of which shall conform to the program of course outlined by the department of education."

It is therefore seen that a system of physical education in our schools is mandatory by virtue of law. It is also observed that any physical education program conducted in the schools shall conform to the outline prescribed by the department of education. It is assumed that the athletic contests that you refer to herein are such contests as follow the prescribed program, and therefore your question is answered in the affirmative. The transporting of county school athletic teams to and from athletic contests is a school function which is, in my opinion, clearly in furtherance of that school's program of physical education.

This office has previously rendered an opinion that a county board of education can purchase athletic equipment out of the general school fund when in furtherance of the system of physical education in the public schools. See Biennial Report of Attorney General, 1936-38, page 261. In the instant case it is noted that the use of property owned or controlled by the school (buses) is the only matter involved and not the purchase of equipment. It is my opinion, upon review of the former opinion of this office and Title 52, Section 555, Code of Alabama 1940, cited supra, that not only can a school bus be used for the purposes you state, but that also the county board of education may authorize release of sufficient funds from the general school fund to pay for the incidental expenses of bus operation that result from such an activity. In the event the general school fund is not sufficient to cover the expenses mentioned above, your attention is directed to Title 52, Section 207, Code of Alabama 1940, which reads as follows

"§207. Appropriation of funds out of county treasury.—The courts of county commissioners or boards of revenue of the several counties of Alabama are authorized at any meeting of said court in any calendar year to appropriate any funds they may deem proper and expedient out of the general funds of the county treasury for the support of the public schools within said county."

It is my opinion that under the above statute the expenses referred to may also be provided for out of the general funds of the

county upon affirmative action being taken by the court of county commissioners or county board of revenue. See Quarterly Report of Attorney General, Vol. 42, page 50 for an analogy.

In answer to other matters posed by your letter of inquiry, it does not occur to me that a "loan" of the bus, as you refer to it, is involved in the stated activity. As I understand the outlined situation, the intended use of the bus is for the transporting of students who are to participate in athletic contests which I assume to be a part of the prescribed school program. As such, this would be in furtherance of said program and I do not interpret this situation as involving a "loan" of the bus, but rather as involving a direct use of the bus by the school.

Further, you make reference to indemnity contracts, and your attention is therefore called to the Constitution of Alabama 1901, Section 14, which reads as follows:

> "That the State of Alabama shall never be made a defendant in any court of law or equity."

Our Alabama Supreme Court took into consideration the status of a county board of education under the above constitutional section in the case of **State v. Brandon**, 244 Ala. 62, 12 So. 2d 319, and stated as follows:

> "This Court has held that a county board of education could sue and be sued to a limited extent, but not on a claim arising from the negligence of one of its servants or agents because it is an independent agency of the State, not one which is immediate, but nevertheless it is acting in a governmental capacity. * * * A county board of education, while not an immediate agency of the State, acts in a public and governmental capacity, and therefore is not liable for the torts of its agents and employees, while so engaged, but is ordinarily otherwise subject to suit. Its funds are State funds. State v. Tuscaloosa County, 233 Ala. 611, 172 So. 892; Williams v. State, for Use and Benefit of Pickens County, 230 Ala. 395, 161 So. 507."

In view of the above decision of the Alabama Supreme Court, it is my opinion that indemnity contracts are not necessary for the protection of the county board of education in the situation outlined. It is my further opinion that should any just claims arise as a result of the operation of school buses in the activity outlined, the proper forum for presentation of such claims would be the State Board of Adjustment.

In view of the explanatory remarks above, it is not deemed necessary that I discuss other matters of indemnity that you refer to in your inquiry.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 14, 1948.

Hon. T. E. Middlebrooks,
State Drug Inspector,
Alabama State Board of Pharmacy,
305 College Street,
Montgomery, Alabama.

Statutes—Act No. 314, General Acts 1947, page 179—Constitutional.

Title of act is sufficiently broad to cover provisions of Section 9 of the Act which is penal in nature.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of April 13, 1948, is as follows:

"Reference is made to the Alabama General Laws, number 314, An Act to regulate the handling, sale, and distribution of barbiturates, approved August 15, 1947.

"There is some question as to the caption of the Act being broad enough to cover Section 9. It is therefore requested that the following information be furnished this office.

"Does the title comply with Section 45 of Constitution as far as Section 9 of this Act?"

It is my opinion that Act No. 314, General Acts 1947, page 179, is not violative of Constitution of Alabama 1901, Section 45. Section 9 of Act No. 314, supra, reads as follows:

"§9. (Penalties.) Any person who violates any of the provisions of Section 3 of this Act shall upon conviction thereof, be subject to imprisonment for not more than one year, or a fine of not more than five hundred dollars, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this Act has become final, such person shall be subject to imprisonment for not more than two years or a fine of not more than one thousand dollars, or both such imprisonment and fine."

The above quoted section of the act is a penalty section and as such, it is properly included in the act. The title to this act reads as follows:

"To regulate the handling, sale, and distribution of barbiturates."

I am of the opinion that this title is sufficiently broad to cover such a penalty provision.

Your attention is invited to the case of **Steadman v. Lamar Kelly et al., as Members of the Alcoholic Beverage Control Board,** decided by the Supreme Court of Alabama on February 19, 1948. In that case the court held constitutional an act which is on all fours with the act here in question. The title of the act construed in the **Steadman Case** was as follows:

"To regulate the sale of alcoholic beverages in Madison County."

Section 2 of that act was a penalty section and read as follows:

"Any person, firm, corporation, or association violating the provisions of this act shall be guilty of a misdemeanor."

The Alabama Supreme Court in the **Steadman Case** held that the act was constitutional and not violative of Constitution of Alabama 1901, Section 45.

In view of the Court's holding in the Steadman case, it is my conclusion that your request must be answered in the affirmative.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 14, 1948.

Hon. John T. Frazer,
Judge of Probate,
Lee County,
Opelika, Alabama.

Municipalities—Elections—Judge of Probate.

1. Judge of Probate must call an election within a reasonable time after electors have voted to change form of municipal government. Title 37, Section 41, Code of Alabama 1940.

2. What constitutes a reasonable time in which Judge of Probate must call an election after electors have voted to change the form of municipal government, pursuant to Title 37, Chapter 4, Code of Alabama 1940, is addressed to discretion of Probate Judge, who should consider various factors prompting the change. In no case should the election be earlier than forty days after the election authorizing the change.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of May 10, 1948, is as follows:

> "Under Title 37, Chapter 4 of the Code of Alabama 1940, the City of Auburn held an election on May 4th to determine whether or not the form of City government should be changed from the Mayor and Council type or to the Commission form. The results were over-whelmingly in favor of the Commission form and have been certified to me, as Judge of Probate, as required by section 40 of said title and chapter.
>
> "Section 41 provides that the Judge of Probate shall forthwith call an election to be held under and governed by this article, for the election of the said Commissioners. I cannot find where there is any limitation as to time as to when this election may be set and I request your opinion as to what would be the maximum time fixed by law to be considered by the Judge of Probate in determining the date on which said election should be held.
>
> "Your immediate attention to this request will be deeply appreciated."

An answer to your inquiry depends upon a construction of the word "forthwith," which appears in Title 37, Section 41, Code of Alabama 1940. The pertinent part of this Section reads as follows:

> "Immediately after the adoption of such form of government, which shall go into effect upon election and qualification of the commission, the probate judge of the county, with whom the petition was filed, shall forthwith call an election to be held under and to be governed by this article, the expense thereof to be paid by the municipality, for the election of three commissioners by the qualified electors of the municipality. * * * * * *"

The courts generally have construed the word "forthwith" to mean that the act referred to should be performed within such convenient time as is reasonably requisite, and what is a reasonable time is to be determined by the facts of the particular case in hand. **Meyers v. Dunn,** 104 S. W. 352, 354, 126 Ky. 548, 13 L. R. A., N. S., 881; **Lewis v. Curry,** 130 Pac. 493, 496, 156 Cal. 93; Words and Phrases, Vol. 17, 414.

In prescribing the time in which an election for change of the form of city government must be called, the legislature (Title 37, Section 36, Code of Alabama 1940) limits the Judge of Probate, whose duty it is to examine the petition for such an election and to ascertain the electoral qualifications of the required signers, to fifteen days from the receipt of the petition in which to certify to the Mayor the fact that the

petition has been filed and found sufficient. The Mayor, pursuant to Title 37, Section 37, Code of Alabama 1940, "shall immediately upon receipt of said petition, from the Probate Judge by proclamation, submit the question of organizing the city under this article at a special election to be held at a time specified therein, within forty days after the receipt of said certificate from said Probate Judge."

It is my opinion that in determining what constitutes a reasonable time for you to act in calling the election mentioned in your inquiry, you should consider the above mentioned mandatory time controls for the Probate Judge and the Mayor to act as a reasonable guide. These mandates are not absolute, but certainly are factors which you must consider along with other facts. You should also observe the provision in Title 37, Section 63, Code of Alabama 1940, which says:

> "Any person desiring to become a candidate at any election which may be held according to the terms of this Article for the office of Commissioner to be elected, may become such candidate by filing in the office of the mayor of said city, if at the first election of the commission under this article, or with the commission at any subsequent election, a statement of such candidacy, * * * *. Such statement shall be filed at least twenty days before the date set for such election and shall be substantially in the following form: * * *"

It is further my opinion that the date for such election, after the call, should in no case be less than forty days, to the end that the persons desiring to become candidates should have time to consider the question after the call has been made. I repeat, there is no fixed time in which you should issue the call, but all factors should be considered and a reasonable time allotted. I think that the call should be made at once and the time for the election should be not less than forty and not more than sixty days after the call has been made. However, the time element is addressed to your reasonable discretion. There may be factors to be considered which I do not have before me.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 18, 1948.

Honorable J. L. Vaughn,
Clerk-Treasurer,
City of Dothan,
Houston, County,
Dothan, Alabama.

Municipalities—Licenses.

Section in privilege license ordinance empowering governing body of the City of Dothan to revoke a license should the

licensee be found guilty of operating a licensed business, trade or profession in an unfair, unjust or illegal manner is a valid authorization under the police power and may be exercised by the Board of Commissioners of Dothan in furtherance thereof.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of April 1, 1948, is as follows:

"Hon. John D. Ayres, President of the Board of City Commissioners of the City of Dothan, Alabama, instructed me this morning to send to you the enclosed Special Privilege License Schedule of the City of Dothan, Alabama, under which we are now operating, and to ask whether or not in your opinion Section 17 on Page 24 of this license schedule is valid and enforceable by the Board of Commissioners of the City of Dothan, Alabama.

"We will appreciate as early reply as is consistent with your convenience."

Section 17, page 24 of the License Schedule to which you refer, reads as follows:

"Section 17. Should any person, firm or corporation be found guilty of operating any business, trade or profession in an unfair, unjust or illegal manner, the Board of City Commissioners shall have the right to revoke the license for said business, trade or profession."

It is my opinion that the above quoted section is valid and authoritative. I assume, of course, that the license ordinance of which this section is a part was lawfully adopted and passed by the governing body of your city.

The Supreme Court of Alabama in the case of **American Bakeries Company of the City of Huntsville,** 232 Ala. 612, 168 So. 880 (2, 3), observed as follows:

"(2, 3). By Section 2154 of the Code it is expressly declared that the power conferred upon municipal corporations by the statute to license business, trades, and professions may be used in the exercise of the police power as well as for the purpose of raising revenue, one or both. The license fixed and levied may have a twofold purpose, as often announced by this court. State v. Kartus, 230 Ala. 352, 162 So. 533, 101 A. L. R. 1336; City Council of Montgomery v. Kelly, 142 Ala. 552, 38 So. 67, 70 L. R. A. 209, 110 Am. St. Rep. 43. But, of course, this power to tax, while inhering in the state, cannot

be so used by the state nor by a municipal corporation so as to 'embarrass and destroy useful and harmless occupations, that are essential to the prosperity of the people, and thus defeat the very purpose for which the power is conferred.' Western Union Tel. Co. v. City of Decatur, 16 Ala. App. 679, 81 So. 199, 201; Id. 202 Ala. 593, 81 So. 205."

Section 2154, Code of Alabama 1923, now Title 37, Section 735, Code of Alabama 1940, reads as follows:

"All municipalities shall have the power to license any exhibition, trade, business, vocation, occupation or profession not prohibited by the constitution or laws of the state, which may be engaged in or carried on in any city or town * * * * *. **The power to license conferred by this article may be used in the exercise of police powers as well as for the purpose of raising revenue, one or both.**" (Emphasis supplied.)

Justice Knight speaking for the Supreme Court of Alabama in the case of **State v. Kartus,** 230 Ala. 352, 162 So. 533, observed as follows:

"(2). The police power of the state is not limited to regulations necessary for the preservation of good order, or the public health and safety. **'The prevention of fraud and deceit, cheating and imposition are equally within the police power of the state,** and the legislature may prescribe all such regulations as, in its judgment, will secure, or tend to secure, the people against the consequences of fraud. 6 R. C. L., § 202, p. 208; People v. Freeman, 242 Ill. 373, 90 N. E. 366, 17 Ann. Cas. 1098; People v. William Henning Co., 260 Ill. 554, 103 N. E. 530,49 L. R. A. (N. S.) 1206; Hawker v. People of New York, 170 U. S. 189, 18 S. Ct. 573, 42 L. Ed. 1002. (Emphasis supplied.)

"No one, at this time, we take it, would have the temerity to undertake to define the 'police power' of a state, or mark its limitations. As was wisely observed by Mr. Justice Brown in Camfield v. United States, 167 U. S. 518, 524, 17 S. C. 864, 866, 42 L. Ed. 260, citing Rideout v. Know, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 550: 'The police power is not subject to any definite limitations, but is co-extensive with the necessities of the case and the safeguard of the public interests.'

"'It by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree,' (Otis v. Parker, 187 U. S. 606, 23 S. Ct. 168, 170, 47 L. Ed. 323); or as put by Mr. Justice Holmes in Arizona Employer's Liability Cases (Arizona Copper Co. v. Hammer, 250 U. S. 400, 432, 39 S. Ct. 553, 560, 63 L. Ed. 1058, 1071, 6 A. L. R. 1537): 'If it is thought to be public policy to put certain voluntary conduct at the peril of those pursuing it, whether in the interest of safety or upon economic or other grounds, I know of nothing to hinder.'

"(4). In the exercise of the police power, citizens may, for the public good, be constrained in their conduct with reference to matters in themselves lawful and right. City of Butte v. Paltrovich, 30 Mont. 18. 75 P. 521, 104 Am. St. Rep. 698; Rifle Potato Growers' Co-Op. Ass'n v. Smith, 78 Colo. 171, 240 P. 937; Pohl v. State, 102 Ohio St. 474, 132 N. E. 20; City of Des Moines v. Manhattan Oil Co., 193 Iowa, 1096, 184 N. W. 823, 826, 188 N. W. 921, 23 A. L. R. 1322.

"In the case of City of Des Moines v. Manhattan Oil Co., supra, in writing of the police power of the state, it was observed: 'With the changing conditions necessarily attendant upon the growth and density of population and the ceaseless changes taking place in method and manner of carrying on the multiplying lines of human industry, the greater becomes the demand upon that reserve element of sovereignty which we call the police power for such reasonable supervision and regulation as the state may impose, to insure observance of the individual citizen of the duty to use his property and exercise his rights and privileges with due regard to the personal and property rights and privileges of others. * * *

" Naturally what regulations may reasonably be required or imposed for that purpose by the constituted authorities varies with the varying conditions with which our lawmakers have to deal and subject only to constitutional limitations, the state, acting by its Legislature, has the right to select the subjects of regulation and prescribe rules for making such regulations effective. To justify the exercise of such authority it is not necessary that the subject thereof shall be inherently wrong; nor is the fact that such regulation may operate to restrict the individual citizen in the use of his own property, or even in his liberty, * * * * of itself sufficient to render the regulation or restriction void. Dillon Mun. Corp. (4th Ed.) 141; Lawton v. Steele, 152 U. S. 133, 136, 14 S. C. 499, 38 L. Ed. 385; Barbier v. Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923; Powell v. Pennsylvania, 127 U. S. 678, 8 S. Ct. 992, 1257, 32 L. Ed. 253; Welch v. Swasey, 214 U. S. 91 (29 S. Ct. 567, 53 L. Ed. 923); Northwestern Laundry v. Des Moines, 239 U. S. 486, 36 S. Ct. 206, 60 L. Ed. 396; Booth v. Illinois, 184 U. S. 425, 22 S. Ct. 425, 46 L. Ed. 623.

" 'The power to designate the subject of police regulation rests in the state alone, and if a given statute is not clearly repugnant to some constitutional guaranty, the courts are without power to interfere. Such interference, if tolerated at all, must be on the theory that the subject of the regulation is not within the legislative jurisdiction; or, if the subject be one within such jurisdiction, it must appear to the court that, looking through mere forms and at the substance of the matter, it can say that the statute enacted professedly in the interest of the public or general welfare has no "substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law." Booth v. Illinois, supra; Overton v. Harrington, 126 Md. 32, 94 A. 325.'

"(6). * * * * * *

In the case of Western Union Telegraph Co. v. City of Decatur 16 Ala. App. 679, 81 So. 199, it was pertinently observed: 'It is universally recognized that the power to tax for revenue is essentially an attribute vested in the legislative department, which it may exercise within constitutional limitations without restraint or judicial supervision. Phoenix Carpet Co. v. State, 118 Ala. 143, 22 So. 627, 72 Am. St. Rep. 143; Barefield v. State (16 Ala. App. 491) 79 So. 396; Dunlap v. State (16 Ala. App. 440) 78 So. 638. And the courts recognize the right of the state to so combine the exercise of this power with the power of police as to embarrass and destroy businesses and occupations recognized as being hurtful to public morals, productive of disorder or injurious to the public good. City Council of Montgomery v. Kelly, 142 Ala. 552, 38 So. 67, 70 L. R. A. 209, 110 Am. St. Rep. 43; Cooley on Taxation (2d Ed.) p. 20; Tiedeman on Limitation of Police Power, 273, 277, 278.'

"(7, 8) Of course, this power may not be so used as to destroy useful and harmless trades. It is the common right of every citizen to pursue any useful and harmless occupation, and to conduct the business in his own way, without unjust discriminative taxation. However, when any business, lawful in nature, is such that it may be conducted in a way as to become hurtful to the public, or when supervision is necessary to confine it to legitimate channels, the state has the undoubted right to throw around it such safeguards as will fully protect the public.

"In the case of Republic Iron & Steel Co. v. State, 204 Ala. 469, 86 So. 65, 68, Chief Justice Anderson, writing for the court, observed: 'In the levy of a privilege or license tax the Legislature is not restricted as to the trades, businesses, or occupations which it may select, or the amount levied, so long as it does not discriminate between members of the same class, that is, those similarly situated, and the tax must not be so exorbitant as to prohibit or oppress or restrain a legitimate and useful trade, business or occupation, as distinguished from a certain class which, while tolerated is recognized as being harmful to public morals, productive of disorder, or injurious to the public. City Council of Montgomery v. Kelly, 142 Ala. 552, 38 So. 67, 70 L. R. A. 209, 110 Am. St. Rep. 43; Standard Chemical Oil Co. v. City of Troy, 201 Ala. 89, 77 So. 383, 387, L. R. A. 1918C, 522; Gamble v. City Council of Montgomery, 147 Ala. 682, 39 So. 353. So long as a privilege or license tax upon the legitimate line of trade, occupation, and business does not violate either of the foregoing requirements, it is in no sense governed, controlled, or restrained, by our constitutional provisions which relate to a direct property tax, as distinguished from a license, privilege, or occupation tax. Authorities, supra.' * * * * *"

The observations of the Court, speaking through Justice Knight, are applicable to municipal governing bodies, who, pursuant to Title 37, Section 735, afore-quoted, have authority to levy privilege license taxes both for revenue and for police regulation.

Concomitant with the power to license is the power to revoke the license. We quote from C. P. S., Vol. 53, p. 650 (44b), as follows:

> "License may be revoked for any reason that would have justified a refusal to issue it in the first instance * * * * * a license may be revoked for specific reasons enumerated by statute or ordinance, etc, * * * * * *."

However, in the exercise of this power to revoke, an arbitrary cancellation, without cause, cannot be made unless, under the provisions of the licensing statute, the license has been issued expressly or impliedly subject to this condition. C. P. S., Vol. 53, p. 651. A power to revoke a license generally is vested in the authority which granted it. C. P. S., Vol. 53, p. 652; Rehman v. City of Des Moines, 200 Iowa 286, 204 N. W. 267; 40 A. L. R. 922.

In our judgment the license is not necessarily a judicial function and the act has been held to be ministerial or administrative. C. P. S., Vol. 53, p. 650.

A license is not an obligation between granting powers and licensee, that is protected in a general sense by contract laws. **Woco Pep Co. v. City of Montgomery,** 213 Ala. 452, 105 So. 214.

Therefore, I conclude that Section 17, supra, may be exercised by the city commissioners, pursuant to their police powers, and may be applied to facts to justify its use. As to when it may be applied is a question of fact for consideration of the city governing bodies, and the sufficiency of existing facts for said application is addressed to the commissions to determine. The licensee, if displeased, may appeal by proper procedure to the courts for review.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 18, 1948.

Hon. Bert E. Thomas,
Director,
Department of Conservation,
CAPITOL.

Department of Conservation—Title 8, Sections 2, 3, and 176. Alabama Public Hunting and Forestry Association, Inc.—

General Acts of Alabama 1945, page 437, approved July 9, 1945.

1. The Department of Conservation has the power and authority to sell lands under its jurisdiction when in its judgment

it is advantageous to the State to do so in the orderly development and management of State parks and parkways.

2. The Alabama Public Hunting and Forestry Association, Inc. has the power and authority to take title to lands of the Department of Conservation and to pledge these lands as security for a loan to raise funds for capital outlay on said lands and to issue bonds for that purpose.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of January 2, 1948, is as follows:

"It is the desire of the Conservation Department, acting through its Division of State Parks, Monuments, and Historical Sites, to develop Gulf State Park, Fort Morgan, and Little Mountain State Park, newly acquired from the Federal Government, in Marshall County, Alabama to such an extent that they will be more adapted for use by the public. The plans for such development call for more adequate overnight facilities by the construction of cabins and cottages and for suitable recreational facilities within these parks which will give the public more desirable vacational advantages.

"In order to accomplish these purposes funds are necessary for the capital investment which is anticipated in these areas. It has been suggested that the Department convey to the Alabama Public Hunting and Forestry Association, Incorporated, certain land within the parks hereinabove named so that the Corporation may, by virtue of Section 445, Title 55, 1945 Supplement of the 1940 Code of Alabama, issue bonds or borrow money and thereby raise capital to cover the cost of improvements referred to. It would be the Department's intention of transferring the real estate to the Corporation so that same may be pledged as security for the loan.

"I would like to have your official opinion as to whether or not, by virtue of Chapter 3, Title 8 of the 1940 Code of Alabama and more particularly Section 176 of such Title, the Department will be authorized to convey to the Alabama Public Hunting and Forestry Association, Incorporated, certain lands lying within Gulf State Park, Fort Morgan in Baldwin County, Alabama and Little Mountain State Park in Marshall County, Alabama, for the purpose of allowing the Corporation to pledge these lands as security for a loan to raise funds for capital outlay within these three parks."

This request requires a dual answer. It is really a request for two separate opinions even though the answer to the first is closely connected with the answer to the second one.

Your first question is simply this, "Does the Department of Conservation have the power and authority to dispose of, by sale, lands which are parts of certain state parks, within the parks system of Alabama, to the Alabama Public Hunting and Forestry Association, Inc.?"

You clothe this question with specified qualifications that the sale of such lands will redound to the benefit of the public by the improvement of recreational facilities within those particular parks.

Your second inquiry is an implied or indirect one and is a multiple question in itself.

"(a) Does the above named corporation have the power and authority to accept title to the land?

"(b) May the corporation borrow money by issuing bonds and pledging the land as security?

"(c) May the corporation use the borrowed money to construct upon the land pledged recreational facilities and use such facilities to liquidate the indebtedness?"

In order to answer question number one, it will be necessary to inquire into the jurisdiction of the Department of Conservation of State parks. When the State Department of Conservation was created by an Act of the Alabama Legislature, (General Acts, 1939, page 255, approved March 14, 1939), among the functions and duties prescribed to it were "to maintain, supervise, operate, and control all state forest, parks, monuments, and historical sites, except Mound State Monument and the First White House of the Confederacy." (Title 8, Section 2, Code of Alabama 1940).

The Department of Conservation's jurisdiction of State parks springs from three acts of the Alabama Legislature, General Acts 1935, page 1078, approved Sepetmber 13, 1945; General Acts Extra Session 1936-37, page 183, approved March 2, 1937; General Acts 1939, page 877, approved September 22, 1939.

These acts were consolidated and brought forward into the 1940 Code of Alabama as Section 3 of Title 8:

> "* * * * The department of conservation for the purpose of establishing, developing and maintaining state forests and state parks and parkways, may acquire land by donation, purchase, condemnation or lease, and for these purposes may use such funds as may be available to it and not otherwise obligated and may enter into agreements with the federal government or other agencies for acquiring by lease, purchase or otherwise such lands as in its judgment are desirable for state forests or state parks or parkways. * * * *"

The jurisdiction of State parks was broadened by granting certain powers and authorities to the Director of Conservation acting through the Division of State Parks, Monuments, and Historical Sites. These powers and authorities are set forth in Section 176, Title 8 of the 1940 Code of Alabama:

> "The director of conservation, acting through the division of state parks, monuments, and historical sites, shall have the following powers and authorities: To acquire in the name of the State of Alabama by purchase, lease, agreement, license, condemnation or otherwise, land deemed necessary or desirable to be preserved, improved protected and maintained as a part of the state park system; . . . . To contract and make cooperative agreements with the federal government, and with states, counties, municipalities, corporations, associations, or individuals for the purpose of acquiring, planning, establishing, developing, utilizing, operating, protecting or maintaining any public park, parkway, monuments or historic site. * * * *"

The power to buy and use carries with it as a natural consequence the power to sell. Section 3 of Title 8, cited supra, contains the following expressed provision:

> "* * * * The department of conservation shall have full power and authority to sell, exchange, or lease lands under its jurisdiction when in its judgment it is advantageous to the state to do so in the orderly development and management of state forests and state parks and parkways; provided, however, said sale, lease or exchange shall not be contrary to the terms of any contract which it has entered into. * * * *"

The authority to convey such lands is predicated upon the discretionary judgment, vested in the Director of the Department of Conservation, that to so convey said lands would be advantageous to and would work a benefit to the State in the orderly development and management of State forests, parks and parkways. The consideration contemplated is not necessarily a consideration to be measured in dollars and cents, but a consideration that may be measured by the prospective benefit to accrue to the State as a result of such a transaction. The inquiry is predicated upon the fact that such transaction will redound to the benefit of the State. By virtue of the provision contained in the Act creating the Alabama Public Hunting and Forestry Association, Inc. (General Acts of Alabama 1945, page 438, approved 9 July 1945), the incorporators, directors, and officers of said Corporation are specifically named in said Act as the Governor, the Director of Conservation, the Director of Finance, and the Attorney General. It follows that the Governor, the Attorney General, the Director of Finance and the Director of the Department of Conservation must all pass upon any corporate transaction before same is made, and, therefore, adequate opportunity is afforded to examine and determine the merit of any such transaction.

I, therefore, answer your first question in the affirmative, that is, the Department of Conservation does have the right to sell to a corporation any part of its State park land when in its judgment the sale is advantageous to the orderly development and management of said park; provided that such sale is not contrary to the terms of any contract which the Department has entered into.

The second or implied question with its three subdivisions may be answered by applying certain provisions of an act of the Alabama Legislature, General Acts 1945, page 437, approved July 9, 1945.

Question 2 (a)—Does the Alabama Public Hunting and Forestry Association, Inc. have the power and authority to accept title to land from the Department of Conservation, is answered directly by Section 5, Subsection (c), General Acts 1945, page 440:

> "Section 5. Powers of Corporation.—(c) to acquire, hold, and dispose of real estate and personal property for its corporate purposes and to receive grants, gifts, donations, and contributions of real and personal property, or any interest therein."

The purpose of statute creating Alabama Public Hunting & Forestry Association, Inc., is to promote the health, comfort, safety and general welfare of people of state through acquisition of lands in state for hunting and fishing preserves and for reforestation and conservation of forests. The act creating Alabama Public Hunting and Forestry Association, Inc., for acquisition of lands in state for hunting and fishing preserves and reforestation and conservation of forests, in its general purposes, is within police power of state. (Opinion of Justices, Number 69, Twenty-third Southern Reporter, Second Series, 505).

It can, therefore, be clearly seen that the answer to question 2 (a) should be in the affirmative, that the Alabama Public Hunting and Forestry Association, Inc., does have the power and authority to accept title to land in order to promote the health, comfort, safety, and general welfare of the people of the state.

Question 2 (b)—May the Corporation borrow money by issuing bonds and pledging the land as security, is answered directly by the application of Section 5, Subsection (j), General Acts 1945, page 441, approved July 9, 1945:

> "Section 5. Powers of Corporation.—(j) to borrow money and to issue bonds therefor in accordance with the provisions of this Act; to purchase real estate or improve such real estate and to issue bonds for the purchase price of such real estate or the cost of improvements thereon, and to pledge such real estate or improvements thereon for the payment of such bonds or purchase price or cost of construction or maintenance of improvements."

The act creating Alabama Public Hunting & Forestry Association, Inc., as agency of state with power to borrow money, issue bonds, and make contracts for acquisition of lands for hunting and fishing preserves and reforestation and conservation of forests, is not unconstitutional as engaging state in "works of internal improvement" or private interest. (Opinion of Justices, Number 69, Twenty-third Southern Reporter, Second Series, 505).

The Supreme Court, in its interpretation of Section 5 of the Act creating said Corporation, has shown clearly that the Corporation may borrow money by issuing bonds and make contracts. The answer to Question 2 (b) is therefore likewise answered in the affirmative.

Question 2 (c)—May the Corporation use the borrowed money to construct upon the land pledged recreational facilities and use such facilities to liquidate the indebtedness, is answered likewise directly by the application of Section 4, and Section 5, Subsections (d), (i), and (j) of General Acts 1945, pages 440-441, approved July 9, 1945:

> "Section 4. Purposes of Corporation.—The purpose of the Corporation shall be to promote the health, safety, comfort and general welfare of the people of the State of Alabama, through the acquisition of lands situated in the State, by purchase, gift, or otherwise, which land is suitable for hunting, fishing, and recreational, or forestry purposes; and to promote the health, safety, and general welfare of the people of the State of Alabama through the maintenance, supervision and control of such lands in furtherance of such purpose."
>
> "Section 5. Powers of Corporation.—(d) . . . . to construct or reconstruct or maintain and operate houses, facilities, or structures or improvements of whatever nature necessary or convenient for its corporate purposes."
>
> "Section 5. Powers of Corporation.—(i) to charge reasonable sums for the use of any land, building, structure, or other facility which it may own or operate, maintain, or supervise."
>
> "Section 5. Powers of Corporation.—(j) . . . . to purchase real estate or improve such real estate and to issue bonds for the purchase price of such real estate or the cost of improvements thereon, and to pledge such real estate or improvements thereon for the payment of such bonds or purchase price or cost of construction or maintenance of improvements."

The act creating Alabama Public Hunting & Forestry Association, Inc., as agency of state with power to lease and sell lands, does not authorize state to engage in dealing in real estate or its products in competition with private enterprise in violation of Constitution. (Opinion of Justices, Number 69, Twenty-third Southern Reporter, Second Series, 505).

Inasmuch as the powers and authorities of the Alabama Public Hunting and Forestry Association, Inc. are broad and strong enough to support the contentions concerning which you have made inquiry, I also answer Question 2 (c) in the affirmative.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 18, 1948.

Hon. William W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Elections—Voting Machines—Judge of Probate.

Inasmuch as the same election officials who held the first primary election also hold the second primary election, in places where voting machines are used it is only necessary for a school of instruction to be held for such officials before the first primary election.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of May 17, 1948, is as follows:

"The question has arisen as to whether or not there should be a school of instruction of the Managers in the Second Primary Election to be held on June 1st.

"Of course, the same officials will be used as were used in the election on the 4th of May, and they attended the school of instruction."

Title 17, Section 103, Code of Alabama 1940, a part of the Article on voting machines, reads as follows:

"(a) Not less than five days before an election or primary election, the authority charged with holding the same shall cause to be held a school of instruction for those who will actually conduct the election or primary election at the polling places. The sheriff shall notify such election officials of the time and place of the holding of such school of instruction, and shall also publish notice at least forty-eight hours before the same is to be held. (b) No election official shall serve in any election district in which a voting machine is used, unless he shall have received such instruction and

is fully qualified to perform the duties in connection with the machine, and has received a certificate from the authorized instructor to that effect; provided, however, that this shall not prevent the appointment of an uninstructed person as an election official to fill a vacancy among the election officials."

The only purpose of such a school of instruction is to insure that the election officials are fully qualified to perform their duties in connection with voting machines.

Title 17, Section 340, Code of Alabama 1940, reads in pertinent part as follows:

"* * * * The second primary election shall be held by the same election officers, who held the first primary election, and be held at the same places the first primary election was held. * * * *."

Cf. Biennial Report of Attorney General, 1932-34, page 630. This statutory provision is applicable where voting machines are used. Title 17, Section 119, Code of Alabama 1940.

Since the same election officials who held the first primary election will hold the second primary election, and the only purpose of a school of instruction is to insure that they are fully qualified to perform their duties in connection with voting machines, no useful purpose could be accomplished by holding another school of instruction for such officials (the same officials) before the second primary election, such a school having been held before the first primary election. To hold otherwise would require that two such schools be held for the same officials within a period of four weeks, since the first and second primary elections are held only four weeks apart. This, in my opinion, would be a wholly useless and unnecessary procedure. Consequently I advise you that it is not necessary for "the authority charged with holding the same" (elections) to cause to be held a school of instruction for the election officials before the second primary election, such a school having been held for the same officials before the first primary election.

In this connection, I call your attention to an opinion of the Attorney General rendered to Hon. J. V. Chambers, Judge of Probate, Chambers County, LaFayette, Alabama, under date of April 28, 1948, a copy of which is enclosed for your information, holding that the phrase "the authority charged with holding the same" used in Section 103, supra, refers to the judge of probate in a primary election.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 20, 1948.

Hon. Frank A. Reagan,
Judge of Probate,
Etowah County,
Gadsden, Alabama.

Mutual Farming or Trucking Associations or Corporations—Fees.

Under Title 2, Section 115-133, Code of Alabama 1940, Probate Judge in whose office articles of incorporation are filed should collect $10.00 from the Corporation plus 15¢ per 100 words for recording the articles of incorporation.

Probate Judge should collect a fee of $2.50 for amendment of articles of incorporation of Cooperative Association or Corporation as provided under Title 2, Section 132, Code of Alabama 1940.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of April 16, 1948, is as follows:

"Inclosed you will find Etowah Dairy Co-op., which was recorded in this Office on December 30th, 1947, and in accordance with provisions of Section 115-133 of Subdivision (3) of Article (9), Title (2) of the Code of Alabama 1940, the following fees were charged:

"Five Dollars ($5.00) for Examination of Title; Five Dollars ($5.00) for Probate Judge fee, plus fifteen cents on each one hundred words for recording fee, no money being collected for Authorized Stock, as we interpret it, they were not due to pay any.

"Now, due to some reason they desire to change the name from Etowah Dairy Co-op., to Etowah Dairies Inc., in accordance with Title 10, Section 18, with the Provisions of 1940 Code of Alabama.

"Question:

"1. Was the filing fee correct in the filing of the Co-op.

"2. If they change the name from Etowah Dairy Co-op., to Etowah Dairies Inc., should we collect for Authorized Capital Stock, as you see, the first Incorporation was under a different Title, now they wish to change in accordance to Title 10, Section 18.

"We will appreciate your opinion at your earliest convenience."

In answering your first question, I have carefully examined the articles of incorporation of Etowah Dairy Co-op and it is my opinion

that you collected the proper fees when the articles were presented to you for recordation.

Title 2, Section 132, Code of Alabama 1940, provides as follows:

"§ 132. Fees for filing articles of incorporation.—For filing articles of incorporation, an association organized hereunder shall pay five dollars to the probate judge in whose office the same is filed; the secretary of state for the use of the state shall be paid five dollars for filing certificate of incorporation forwarded by probate judge as provided by law. And for filing an amendment to the articles, two and one-half dollars."

Title 2, Section 116, Code of Alabama 1940, provides in part as follows:

"§ 116. How association may be formed.—* * * * The articles must be subscribed by the incorporators and acknowledged by one of them before an officer authorized by the law of this state to take and certify acknowledgments of deeds and conveyances, and shall be filed in accordance with the provisions of the general corporation law of this state. * * * *"

Title 11, Section 29, Code of Alabama 1940, provides in part as follows:

"§ 29. Fees allowed to judges of probate.—Judges of probate are entitled to the following fees for the following services: * * * * Recording wills, inventories, sale-bills, reports, certificates, transcripts, returns, orders, decrees, declarations of incorporation, deeds and all other instruments, and all proceedings required by law to be recorded, and not otherwise provided for, for each one hundred words ..... .15
* * * *."

In my opinion, you were correct in collecting $10.00 from the Co-op., $5.00 to be retained by the probate judge to be disposed of as provided by law, $5.00 to be sent by the probate judge to the Secretary of State, along with the report of incorporation and 15¢ per hundred words for recording the articles of incorporation in your office.

An opinion of this office under date of July 18, 1936, to Hon. Chas. W. Lee, State Comptroller, Quarterly Report of Attorney General, Vol. 10, page 54, is hereby modified to conform with this opinion.

In answering your second question, it is my opinion that when the articles of incorporation of the Co-op. are amended and the name of the Co-op. is changed to Etowah Dairies, Inc., you should only collect a fee of $2.50 for filing the amendment as provided by Title 2, Section 132, Code of Alabama 1940.

Title 10, Section 18, Code of Alabama 1940, provides in part as follows:

"§ 18. Changes or amendment of charter and scope of business; how effected.—Every corporation chartered under this title or under

any general or special law of this state may change the nature of its business, the par value of the shares of its stock, change the location of its principal office in this state, renew or extend its corporate existence, change its corporate name, and make such other amendment, alteration, or change of its charter as may be desired in the following manner: * * * *."

The $2.50 fee that you collect should be paid to the State. See Quarterly Report of Attorney General, Vol. 30, page 135.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 20, 1948.

Hon. J. O. English,
Judge of Probate,
Coffee County,
Enterprise, Alabama.

Plumbers—License

1. A person, regardless of his employer-employee status, who does the actual manual work of connecting pipes, fixtures, etc., is doing business as a plumber within the meaning of Title 51, Section 574, Code of Alabama 1940, and must pay the occupational license tax therein outlined.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of December 16, 1947, is as follows:

"We have a plumbing organization in Enterprise, who has paid their State and County Licenses for the company.

"This company has a number of employees whom they send out over the city to do plumbing wherever they are needed, and these employees state that they do work pointed out to them by the company and the company assesses the charges and does the collecting and these employees only do the work as set out by a member of the organization.

"The question is, whether or not these employees are liable for State and County license. One of these employees is working as a learner, and is an ex-service man, who is receiving benefits from the Government while taking this training, and he along with the other employees have no State and County License.

"We will thank you very much to let us hear from you at your earliest convenience as to whether or not these employees of this plumbing organization are liable for license."

It is my opinion that the employees of the company must obtain plumbers' licenses as set forth in Title 51, Section 574, Code of Alabama 1940.

Section 574, is as follows:

"Plumbers, steam fitters, tin shop operators, etc.—Each person doing business as a plumber, steam fitter, or operator of a tin shop or roofing shop, in towns or cities of fifty thousand inhabitants, or over, twenty-five dollars; in cities and towns of ten thousand inhabitants and less than fifty thousand inhabitants, fifteen dollars; in cities and towns of less than ten thousand inhabitants, ten dollars; in all other places, whether incorporated or not, five dollars."

This office has held that where a person is doing business as a plumber, he is liable for a license wherever he is doing business, whether he has an established place of business or not. Biennial Report of Attorney General, 1934-36, page 393, and Biennial Report of Attorney General 1930-32, page 413.

In the case of **Brown Plumbing and Heating Co. Inc. v. McDowell.** 240 Ala. 485, 200 So. 104, a person doing business as a plumber was defined as follows:

"All the cases found * * * * * explicitly, or by implication, recognize that a person engaging in business as a plumber is the person doing the manual work of connecting pipes, fixtures, etc. * * * * * *."

I, therefore conclude that the employees of a plumbing organization, who do the actual manual work of connecting pipes, fixtures, etc., are doing business as a plumber, within the meaning of Section 574, supra, and are therefore subject to the occupational license tax imposed by that Section.

In connection with the veteran mentioned in your request, supra, your attention is directed to Act No. 353, General Acts 1945, page 570, approved July 6, 1945, as amended by Act No. 698, General Acts 1947, page 535, approved October 13, 1947, which exempts veterans of World War II from business or occupational license taxes to the extent of $35.00, provided the conditions of the Act are met.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 20, 1948.

Honorable J. D. Mitchell,
Director,
Department of Public Safety,
CAPITOL.

Highway Patrol—Department of Public Safety.

The Highway Patrol, under authority of Title 36, Section 71, Code of Alabama 1940, as amended by Act No. 446, General Acts 1943, p. 408, has authority to expend its funds for the Division of Traffic Safety to carry out its program.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of April 6, 1948, is as follows:

"The Department of Public Safety, in carrying out its statutorial provisions, has created and is now operating within its sphere a Division of Traffic Safety. This Division is devoted to the promotion of safety, pedestrian as well as vehicle traffic, throughout the State and the organization of safety councils where needed.

"It is the purpose of this Division to carry the Safety Program in every section of the State to minimize traffic hazards, violations and accidents which have taken a heavy toll in recent months. In order to carry out the program now outlined for this Division it is essential that traffic and safety conferences be held and have specialist and technicians address, consult with and advise the various safety conferences and councils. It is also necessary that an active and strenuous campaign for safety be inaugurated through the medium of public address, radio, newspapers and advertising.

"This predicate is given you for the purpose of requesting your official opinion as to whether or not the Department of Public Safety through the Division of Traffic Safety can expend its funds for the purposes outlined and for the promotion of a safety campaign which is so urgently needed in our State and which is being conducted in all of our neighboring States and throughout the nation.

"We would appreciate your usual prompt attention in the premise."

My answer to your question is in the affirmative.

In this regard, your attention is called to the pertinent parts of Title 36, Section 71, Code of Alabama 1940, as amended by Act No. 446, General Acts 1943, p. 408, which read as follows:

"The governor is authorized to establish and maintain a state highway patrol to be headed by the director of public safety to be appointed by the governor and whose salary shall be fixed by the governor according to law. * * * * * * The necessary expenses and the costs of necessary equipment, when approved by the governor and the director of the department of finance, are likewise to be paid by warrants drawn by the comptroller on the highway patrol fund in the state treasury. There is hereby appropriated out of said highway patrol fund in the state treasury any or all moneys in said fund that may be necessary to pay the salaries or expenses provided for or incurred under the provisions of this article. * * * * * * *"

It is to be noted from the above quoted part of Section 71, as amended, that the funds of the Department of Public Safety may be used to defray the necessary expenses to carry out the provisions of the article of which this section is a part, this article being Article 1, Chapter 2, Title 36, Code of Alabama 1940.

From the context of this article, it will be noted that its main purpose is to promote safety on the highways of the State. It is common knowledge that an educational program for the people of the State is in furtherance of public safety. Certain it is that the work of the Division of Traffic Safety in carrying out an educational program is designed to promote safety in the State of Alabama and is one of the expenses incurred under the provisions of Article 1, Chapter 2, supra.

The whole purpose of setting up the Department of Public Safety and appropriating funds for its operation was to make the highways of the State of Alabama safe, and as far as possible to cut down deaths and casualties caused by traffic accidents.

You are, therefore, advised that the expenditures contemplated to be made by the Division of Traffic Safety in carrying out its program, if approved by the Governor and Director of the Department of Finance, would be legal expenditures under the provisions of Section 71, as amended, supra.

From the foregoing, it is my opinion that all of the expenditures outlined in the above request may be made from the Highway Patrol fund, for certain it is the expenses of this program is an expense incurred under the provisions of Article 1, supra.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 27, 1948.

Hon. T. C. Almon,
Judge of Probate,
Morgan County,
Decatur, Alabama.

Elections—Absentee Ballots.

1. A person holding an elective office in a county, even though authorized to take acknowledgment of deeds, may not take the acknowledgment of an absentee voter.

2. A person employed as an employee of any county officer who maintains or works in an office in the court house of a county, even though authorized to take acknowledgments to deeds, may not take the acknowledgment of an absentee voter.

3. All other persons authorized to take acknowledgment to deeds may take the acknowledgment of an absentee voter.

4. A county service commissioner, appointed under the provisions of Act No. 173, General Acts 1945, page 304, being a State officer or employee, and a register in chancery, being an appointive official of the county, may take the acknowledgment of an absentee voter; but a deputy register, being an employee of a county officer who maintains or works in an office in the court house of a county, may not take the acknowledgment of an absentee voter.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion bearing date of May 18, 1948, is as follows:

"Act No. 478 of 1945, among other things, recites, as follows:

" 'The form of oath or affidavit which shall be attached to and accompany such absentee ballot by such absent voter in all general elections held hereafter shall be sworn to before an officer authorized to take acknowledgments to deeds, except, however, that no such officer who holds an elective office or is employed as an employee of any county officer who maintains or works in an office in the court house of the county in which the absentee voter is a qualified voter shall administer such oath, * * * *.'

"Will you please give me the benefit of your legal opinion.

"First. Could the Service officer of Morgan County, who has an office in the court house take the acknowledgment of an absentee voter to his ballot.

"Second. Could the Register in Chancery, who has an office in the court house, who is on a fee basis, and who is appointed by the presiding Circuit Judge, take the acknowledgment of an absentee voter to his ballot.

"Third. Could the Deputy Register, who is employed in the office of the Register in Chancery take the acknowledgment of an absentee voter to his ballot."

The quotation from Act No. 478, General Acts 1945, page 711, contained in your letter of inquiry, appears in both Sections 9 and 10 thereof, Section 9 having application to general elections and Section 10 having application to primary elections.

It appears that the obvious intent of these provisions was to prevent elective officers of a county and their employees from taking the acknowledgment of an absentee voter, and thus having an opportunity, perchance, to influence the choice of such voter. However, the language of the provisions is broader than that and also includes, in addition to elective officers of a county and their employees, the employees of any county officer, elective or appointive, who maintains or works in an office in the court house of a county; but it does not include appointive county officers. This results in the anomalous situation that an appointive county officer, if he is authorized to take acknowledgments to deeds, may take the acknowledgment of an absentee voter; while one of his employees, even though authorized to take acknowledgments to deeds, may not take such acknowledgment. Yet, I am not willing to extend the provisions to include any person not strictly within the language thereof.

Applying these provisions to the specific persons mentioned in your letter of inquiry, I advise you as follows:

1. A county service commissioner, appointed pursuant to the provisions of Act No. 173, General Acts 1945, page 304, is a State officer or employee under the express provisions of Section VI of said act, and, therefore, is not within the purview of these provisions. Consequently, he may take the acknowledgment of an absentee voter.

2. A register in chancery is an appointive county officer, being appointed by the circuit judge of the circuit in which the county is located, and, therefore, is not within the purview of these provisions. Consequently, he may take the acknowledgment of an absentee voter. Of course, if the circuit clerk, an elective officer of the county, is also the register, as is frequently the case, he would be within the purview of said provisions and could not take the acknowledgment of an absentee voter.

3. A deputy register, who is employed in the office of the register in chancery, is an employee of a county officer who maintains or works

in an office in the court house of a county, and, therefore, comes within the purview of these provisions. Consequently, he may not take the acknowledgment of an absentee voter.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 2, 1948.

Hon. C. O. Weekley, Chairman,
Board of Revenue,
Baldwin County,
Bay Minette, Alabama.

Counties—Agriculture and Industries.

Baldwin County authorized to appropriate county funds to a Cattle Show and Fair Association, a non-profit corporation, organized for the purpose of developing the livestock industry in the county.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of March 22, 1948, is as follows:

"Public spirited citizens of Baldwin County have organized a Cattle Show and Fair Association and are erecting a building to be used for this purpose at Robertsdale. Their objective is the development of the livestock industry in Baldwin County. They are asking the County Commission to make an appropriation of county funds to assist in the erection of the building. The building when completed will be owned by individuals and public bodies contributing to it. A non-profit corporation will be organized to hold title to the building.

"Title 12, Section 12, Subsection 22, authorizes the county to appropriate and use County Funds for the purpose of developing and advertising its agricultural, mineral, water, labor and other resources, and for the purpose of locating and promoting agriculture, manufacturing plants and other industries.

"Section 94 of the Constitution provides that, 'The legislature shall not have power to authorize any county to lend its credit or to grant public money or things of value in aid of any individual, association or corporation whatsoever, or to become a stock holder in any association, corporation or company by issuing bonds or otherwise.'

"The County desires to assist in this enterprise, believing it will be of substantial aid in the development of the livestock industry. The County Commission has directed me to ask your opinion as to whether or not the County Governing Body can legally appropriate county monies in aid of the construction of such building for such purposes under the conditions of the proposed ownership.

"Should your answer be that in your opinion the proposed association or non-profit corporation holding legal title, would be a private corporation under Section 94 and that the county could not appropriate money to such a corporation and could not accept stock in such corporation for its appropriation thereto, the Commission would then appreciate your pointing out such change in the proposed prospectus as would enable it to make an appropriation for this purpose."

In my opinion, your inquiry should be answered in the affirmative.

Title 12, Section 12, Subsection 22, Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560, provides in pertinent part as follows:

"To set aside, appropriate and use county funds or revenues for the purpose of developing, advertising and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories and other industries in their respective counties. * * *"

Volume 3, Permanent Edition 3, Words and Phrases, Page 46, provides in part as follows:

"Literally, 'agri cultura' means the tillage or cultivation of the soil, but is regarded as synonymous with husbandry, and includes, not only cultivation of soil and raising of crops, but also gathering in the crops, raising livestock, marketing products of the soil and the increase and products yielded by stock, such as wool and milk. 'Agriculture' is the cultivation of soil for food products or any other useful or valuable growths of the field or garden; tillage, husbandry; also, by extension, farming, including any industry practiced by a cultivator of the soil in connection with such cultivation, as breeding and rearing of stock, dairying, etc. Kenney v. Beasman, 182 A. 566, 568, 569, 169 Md., 103 A. L. R. 1515."

This office has held that county governing bodies may appropriate and expend funds for the following matters in connection with the agriculture growth of the counties:

County authorized to appropriate county funds to County Artificial Breeding Association, a non-profit organization organized for the purpose of developing and promoting a better cattle program

for the county.—Opinion of this office rendered Hon. J. H. Howard, Judge of Probate, Wetumpka, Alabama, under date of October 31, 1947.

County governing bodies authorized to appropriate and expend funds in assisting the Production Marketing Association in the payment of office rent in the furtherance of and promotion of agriculture.—Quarterly Report of Attorney General, Volume 46, page 127;

To purchase a motion picture machine for the sole use of County Extension Service Agents in projecting visual education on farm subjects.—Quarterly Report of the Attorney General, Volume 39, page 52;

To appropriate county funds for club house in promotion of agriculture.—Quarterly Report of Attorney General, Volume 20, page 51;

To furnish Farm Security Administration with telephone.—Quarterly Report of Attorney General, Volume 18, page 344;

To aid in payment of the administrative expenses of the officers of the Farm Security Administration.—Quarterly Report of the Attorney General, Volume 17, page 399;

To compensate an employee of the Triple A for additional and independent services performed for the county.—Quarterly Report of the Attorney General, Volume 17, page 247;

To pay the salary of an assistant for the Farm Security Administration program.—Quarterly Report of the Attorney General, Volume 10, page 132;

To install and maintain exhibit of agricultural resources.—Quarterly Report of the Attorney General, Volume 9, page 80;

To appropriate money for soil erosion and promotion of agriculture.—Biennial Report of the Attorney General, 1934-36, page 294;

To make an appropriation for the promotion of agriculture.—Biennial Report of the Attorney General, 1932-34, page 430.

The premises considered, it is my opinion that Baldwin County may legally appropriate county funds to a Cattle Show and Fair Association, a non-profit corporation organized for the purpose of developing the livestock industry in the county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 4, 1948.

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama.

Officers—Eminent Domain—Boards of Equalization.

Commissioner to assess value of property in eminent domain proceedings appointed, and otherwise qualified, under Title 19, Section 11, Code of Alabama 1940, (1) may be member of county board of equalization, and (2) is not disqualified if over 65 years of age.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of May 19, 1948, is as follows:

"I will appreciate your opinion on the two following points:

"(1) May a member of the County Tax Equalization Board legally serve as a commissioner appointed by the Probate Court to assess damages in cases where private property is being condemned by counties for public use?

"(2) Is a person over 65 years old disqualified by reason of age from serving as commissioner appointed by the Probate Court to assess damages in cases where private property is being condemned by counties for public use?

"Your usual very prompt attention will be greatly appreciated."

I am of the opinion that your first inquiry should be answered in the affirmative, and your second inquiry in the negative.

The appointment and qualifications of commissioners to assess the value of property in eminent domain proceedings is found in Title 19, Section 11, Code of Alabama 1940, which provides as follows:

"§ 11. Commissioners appointed; qualifications of.—If the application be granted, in whole or in part, the judge of probate must appoint three citizens of the county in which the lands sought to be condemned are situated, **who shall possess the qualifications of jurors,** who shall be disinterested, and who shall file a certificate along with their award that neither of them had ever been consulted, advised with, or approached by any person in reference to the value of the lands, or the proceedings to condemn the same prior to the assessment of damages, and that they knew nothing of the same prior to their appointment; and the judge of probate may fill any

vacancy occasioned by death, failure to act, or any disqualification of any such commissioners from interest, prior knowledge of the subject-matter, or being consulted with, advised with, or approached in reference to the condemnation of such lands prior to appointment or assessment of the damages." (Emphasis supplied.)

Title 51, Section 92, Code of Alabama 1940, provides as follows:

"§ 92. Members not to hold other governmental positions.—No member of any county board of equalization shall hold employment or office of profit with the United States, the State of Alabama, any county or other political subdivision of said state, or with any board, department or other agency of the United States, of the State of Alabama, of any county or other political subdivision of said state or with any county school board or with any municipality, while holding office as a member of said board." (Emphasis supplied.)

One serving as a commissioner under Title 19, Section 11, supra, does not, in my judgment, hold employment or office of profit within the inhibitions of Title 51, Section 92, supra. This is true even though the eminent domain proceedings are instituted by the county. Such commissioners are performing a public duty as servants of the court and their compensation is paid out of the courts costs.

Under Title 19, Section 11, supra, if one is otherwise qualified, and he possessed the qualifications of a juror, he may serve as a commissioner. Act No. 325, General Acts 1943, page 309, amending Title 30, Section 21, Code of Alabama 1940, authorized and allowed one over sixty-five years of age to serve as a juror, but did not require him to do so. It removed this former disqualification under the Code section before the amendment.—cf. Quarterly Report of Attorney General, Volume 46, page 88.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 4, 1948.

Hon. Amos I. Waldrop,
Office of Superintendent,
Walker County Board of Education,
Jasper, Alabama.

Schools—Lands—Timber.

Merchantable timber on lands deeded to the State for public school purposes under Act No. 187, General Acts 1919, page 187, may be sold and proceeds applied exclusively for public school purposes. Such a sale is not a permanent abandonment of the

property for public school purposes so as to effectuate a reversion to the original grantor.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of May 12, 1948, is as follows:

"On April 4, 1921, after the passage of the act fund in Acts 1919, page 187, and before the adoption of the 1923 Code, the Walker County Board of Education received, as a donation, a conveyance made to the State of Alabama to forty acres of land. This forty acres of land was for rural school purposes in connection with the Tutwiler School located in Walker County, Alabama. There was erected upon the land a school building and in which a school had been regularly maintained each school year on the same basis as other schools in the County.

"There is certain merchantable timber on said forty acre tract of land and it is now right and ready for the market and timber is now in demand and will command a good price. However, no sale would be made of the timber if such a sale would cause the property to revert to the original grantor.

"The deed conveying this land to the Walker County Board of Education was conveyed under the provisions of the aforesaid Acts, which Act provides that if said property should be abandoned for school property, the same would automatically revert to the original owners thereof.

"Please advise if, under the General Acts of 1919, page 187, the Walker County Board of Education could legally sell the merchantable timber on said forty acres of land at a reasonable price or if the Board of Education has the authority to authorize the same cut and removed provided that all the money received from the sale of said timber is applied exclusively for school purposes."

For the purposes of this opinion, I am assuming that the deed to the property in question was executed in accordance with and contained only the reversionary provision of Act No. 187, General Acts 1919, page 187. Furthermore, I wish to state that this is merely an opinion of this office on the question presented, and in no wise is to be considered as a judicial determination of the title involved.

Answering your inquiry, it is my opinion that the County Board of Education of Walker County has the authority to sell the timber in question and apply the proceeds exclusively for public school purposes.

Act No. 187, General Acts 1919, page 187, provides as follows:

"Section 1. Be it enacted by the Legislature of Alabama, That when any lands are donated to the State as sites for a rural public school, and deeded to the State for a nominal consideration as a donation, **and the use thereof for public school purposes is thereafter permanently abandoned for such purpose, the title to the land so deeded shall revert to the original owner,** provided that the buildings or other improvements may be removed from such land within a reasonable time after abandonment by the school authorities and disposed of for the benefit of the public school in such district as the trustees of such district may determine. (Emphasis supplied.)

"Section 2. The county boards of education are authorized to accept gifts of land for such schools with the approval of the State superintendent of education under the terms of this act and when so deeded to the State, such conveyance shall be sufficient to authorize the State department of education to extend the State aid authorized by law in the erection of public school buildings.

"Approved July 28, 1919."

This act has been held constitutional by this office.—Quarterly Report of Attorney General, Volume 6, page 54.

A sale of the merchantable timber in question on the lands deeded to the State under the above quoted act, and a use of the proceeds of said sale exclusively for public school purposes, would not, in my opinion, effectuate a reversion to the original grantor. Although the standing timber is part of the realty, the sale is not tantamount to a permanent abandonment of the use for public school purposes. On the contrary, the land itself is still being used for public school purposes and the proceeds of the sale are to be likewise so applied.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 5, 1948.

Hon. R. T. Goodwyn, Jr.,
Chairman, Montgomery County
Democraitc Executive Committee,
Montgomery, Alabama.

Elections—Second Primaries—Certification of Party Nominee.
Title 17, Section 366, Code of Alabama 1940.

1. Chairman of the county executive committee should certify to and file with the Judge of Probate as nominees of the party concerned those candidates receiving the highest total vote cast in a second primary election for the office in question,

even though one or more of such candidates may not have received a majority of the total vote cast in such second primary.

2. The primary laws of the State make no provision for any special or "third" primary except in the event of a contest of such election or in the event of the death, designation, revocation or other removal of such nomination.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of June 4, 1948, is as follows:

"In the recent runoff Primary there were four candidates for members of the Board of Revenue of Montgomery County, of which two were to be nominated. One of these candidates received a clear majority of all the votes cast. The second highest man failed to receive a majority.

"In this connection I would like for you to give me, as Chairman of the Montgomery County Democratic Executive Committee, your opinion on the following questions:

"1. Should I as chairman of the Montgomery County Democratic Executive Committee certify to and file with the Judge of Probate as nominee of the Democratic party a candidate who did not receive a majority of all the votes cast in the Second Primary but did receive the highest number of votes cast. In this connection, I call your attention to Title 17, Section 366 of the 1940 Code of Alabama.

"2. Should you answer the above in the negative, what procedure should be taken by the County Democratic Executive Committee to determine the Democratic nominee?

"I shall deeply appreciate your giving me a very early reply, as Section 366, supra, requires that the Democratic nominee be certified to the Probate Judge within five days after the Committee canvassed the returns of the Second Primary.

"Eighteen candidates for Board of Revenue for Northern District in first primary, 3 to be nominated. One received a clear majority, leaving two to be nominated in Second Primary. In the Second Primary, 4 ran (double the number to be elected)."

Your inquiry presents for my consideration a situation which, though not unique, rarely occurs in the conduct of primary elections and is apparently not anticipated nor provided for within the statutes governing such elections.

The pertinent statutes of this State governing and controlling the holding of primary elections by any political party for the purpose of nominating candidates for office are found set out in Title 17, Sections 336-412, Code of Alabama 1940. The only amendments thereto are not pertinent to your inquiry. Section 366 of the above statutes, referred to by you in your inquiry, provides, with respect to county offices, that the chairman of the county executive committee of the parties concerned shall canvass, tabulate and publicly declare the results of any such primary election, further providing that such county committee shall publicly ascertain, determine and declare if any candidate for office in said primary election has received a majority of the votes cast for that office, and, if so, declare said candidate the nominee of the party for the office for which he was a candidate and for which he received a majority of the votes cast for that office in said primary election, and if no candidate received a majority of all of the votes cast in such primary election for any one office or offices for the nomination to which there were more than two candidates, then a second primary election shall be ordered to be held on the fourth Tuesday next thereafter following said primary election.

It is provided with respect to such second primary election, if such be held, that after the results thereof have been received, canvassed and tabulated, the county executive committee concerned shall publicly ascertain and determine the candidates receiving a majority of all of the votes cast in such second primary election for any one office, and the candidates so ascertained and determined to have received a majority of all of the votes cast in such second primary election for said office shall be declared the nominee of the party for such office.

It is also provided within such statute that:

> "* * * If nominee for two or more offices (constituting a group) are to be selected, and there are more candidates for nomination than there are such offices, then the majority of votes cast for said office in such election shall be ascertained by dividing the total vote cast for all such candidates by the number of positions to be filled, and then dividing the result by two. Any number of votes in excess of the number ascertained by such last division shall be the majority herein provided for necessary for nomination. If in ascertaining the result in this way, it appears that more candidates have obtained this majority than there are positions to be filled, then those having the highest vote, if beyond the majority just defined, shall be declared the nominees for the positions to be filled."

It is, therefore apparent from the above statute that, in the event of group nominations, those candidates ascertained and determined to have received a majority of all the votes cast in either the first or second primary are to be declared the party nominees for the positions to be filled, unless it develops that more candidates have received a majority of the total vote than there are offices to be filled, in which event, those candidates having the highest total vote are to be declared

the nominees of the party. However, nowhere within this statute, nor within the other statutes governing primary elections, do I find any provision taking cognizance of a converse situation wherein in a second primary election there are fewer candidates receiving a majority of the total vote cast than there are offices to be filled. I must, therefore, resort to an application of the accepted rules of statutory construction to the pertinent statutes concerned to determine the intent of the legislative body in this regard.

As has been stated by the Supreme Court of the State, one may, in determining the legislative intent in construing a statute, look to other provisions of the same act, consider its relation to other statutory and constitutional provisions, view its history and purposes to be accomplished, and critically examine results that would flow from giving such statute the meaning it might have if none of these things were considered. **Abramson v. Hard**, 229 Ala. 2, 155 So. 590; **Birmingham Paper Company v. Curry**, 238 Ala. 138, 190 So. 86; **Cole v. Gullatt**, 241 Ala. 669, 4 So. 2d 412.

Examination of the laws of the State relative to the conduct of primary elections as originally enacted by Act No. 56, General Acts 1931, page 73, and now codified as Title 17, Sections 336-412, supra, reveals that it was unquestionably the intention of the framers thereof that party nominations for office be made no later than the second primary provided for therein. Such intent is indicated in more than one instance throughout the body of such act, and within the statutes codified therefrom.

Title 17, Section 340, supra, prescribes the date upon which primary elections are to be held, taking cognizance only of primary and second primary elections, and provides that:

> "* * * No primary shall be held by any political parties for the nomination of candidates except as herein provided."

Title 17, Section 367, supra, prescribes the procedure to be followed in the event of a tie vote being cast in any primary election, providing that in such event such tie shall be decided by the chairman of the state executive committee, if the office be an office other than a county office, and by the chairman of the county executive committee if the office be a county office.

As has previously been noted, Section 366, supra, takes cognizance of and makes provision for a situation wherein more candidates receive a majority of the total vote cast than there are offices to be filled, providing that in such event those candidates with the highest total vote are to be declared the party nominees.

The only authority I find within our primary laws for the holding of a special or "third" primary election is that found within Section 371 and Section 388, supra. The former provides that where a vacancy may occur in any nomination either by death, designation, revocation or otherwise, or in case of any special election where the office to be filled

is a county office, the county executive committee shall have the power and authority to fill such vacancy, either by action of the committee itself, or by such other method as such committee may see fit to pursue, subject to the approval of the state executive committee of the party concerned. The latter statute provides that if, upon the hearing of any contest for any office, as provided for in this chapter, the committee, after an investigation and hearing of the contest, shall determine that it is impossible from the evidence before it to decide who is the legally nominated candidate for the office contested, it shall have the right and authority to direct a new primary election for the nomination to any such office.

Neither such situation here exists, and I am, therefore, of the opinion that no authority exists for the holding of any special or "third" primary should it be held that sufficient nominations have not been made in the second primary for the offices to be filled.

As has been well said by the Supreme Court of the State in the case of **Prowell v. The State ex rel Hasty et al,** 142 Ala. 80, 39 So. 164,

> "The law abhors vacancies in public office, and great precautions are taken to avoid their occurrence."

To, therefore, hold that nomination has not been made for the office here concerned, in the absence of any authority for making such nomination, would, in effect, create a vacancy in public office with no legal means existing for the filling of same. Such, in my judgment, would be contrary to all concept of law, contrary to the accepted policy of the State, and in complete violation of the spirit and intent of the laws governing our primary elections.

Although of no great import here, it might be pointed out that the Legislature, in enacting the present primary laws of the State, Act No. 56, supra, provided therein that the provisions thereof were to be liberally construed so that the will of the voters might not be defeated by an informality. This is additional evidence of the intention of the Legislature that party nominations for office be accomplished no later than the second primary, in the absence of any extraordinary conditions, such as a contest, etc., as set out above.

As is well known, courts will look beyond the mere phraseology of statutes to arrive at their substance and effect, and the spirit and not the letter of a statute will prevail where the latter will lead to an injustice or absurdity. **Tennessee Coal, Iron and R. R. Co. v. State,** 235 Ala. 152, 177 So. 905; **Broaddus v. Johnson,** 235 Ala. 314, 179 So. 215.

In view of all the above, I can arrive at but one conclusion, and it is my judgment and opinion that you should certify to and file with the Judge of Probate as nominees of the Democratic Party those candidates receiving the highest total vote cast in such second primary election for

the offices in question, even though one or more of such candidates may not have received a majority of the total vote cast in such second primary.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 7, 1948.

Hon. S. G. Johnson,
Judge of Probate,
Lamar County,
Vernon, Alabama.

Counties—Health and Health Department—Hospitals.

Under the provisions of Title 22, Section 14(12), Code of Alabama 1940, the county governing body of Lamar County may legally appropriate funds for the operational expenses of a hospital association formed under Act No. 211, General Acts 1945, page 330, as amended by Acts No. 271 and 643, General Acts 1947, pages 114 and 496 respectively, if such appropriation has been recommended by the county health officer, endorsed by the county board of health, and approved by the county governing body.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of January 9, 1948, is as follows:

"There has been recently established in this county the Lamar County Hospital Association, Inc., the purpose of which is to build and operate a public hospital in this county.

"Please render me an official opinion as to whether or not the county governing body of Lamar County may legally appropriate county funds for the operational expenses of this association until funds are available for this purpose from other sources."

In my letter of January 29, 1948 I requested you to advise me exactly what was meant by "operational expenses" referred to in your request.

Under date of February 6, 1948 you advised me that "operational expenses" consisted of the following:

"1. Postage

"2. Stationary

"3. Stenographic help

"4. Traveling expenses for the Chairman of the Board of Directors or any Director who has to travel on hospital association business.

"5. Telephone calls

"6. Recording fee to Secretary of State for Incorporation papers."

While it is not stated in your request for an official opinion, it is presumed that the Lamar County Hospital Association, Inc., to which you refer, has been formed under the provisions of Act No. 211, General Acts 1945, page 330, as amended by Acts No. 271 and 643, General Acts 1947, pages 114 and 496, respectively. Act No. 211, supra, relates to the State master hospital plan, and provisions are set forth therein authorizing the establishment of incorporated hospital associations and outlining their general functions and purposes. Primarily, the formation of a hospital association appears to be for the purpose of creating a local board which can work with the State Board of Health in the development of local hospital facilities under the master hospital plan. This would entail activity in cooperation with the State Board of Health in laying the ground work for local hospital projects and ensuing supervision of construction, maintenance and management of the local hospital.

Section 13 of the Act reads as follows:

"The governing bodies of each local political subdivision involved are hereby authorized to appropriate their respective shares of the cost of constructing, maintaining, equipping and operating such hospitals as determined upon by agreement between the executive committee of the associations and the State Board of Health. The sums so appropriated shall be paid into the treasury of the corporation and shall be paid out on certificate of the executive committee of the corporation."

While provision is thus made for funds to cover the costs of constructing, maintaining, equipping and operating said hospitals, no appropriation appears available to the association, as such, for operational expenses.

However, your attention is directed to Title 22, Section 14(12), Code of Alabama 1940, which reads in pertinent part as follows:

"* * the court of county commissioners, or other like board, * * may in its discretion appropriate, from the revenues of the county, money for the prosecution of public health work which has been recommended by the county health officer and indorsed by the county board of health and approved by said court of county commissioners, or other like board."

The term "from the revenues of the county" means from the general fund of the county. **Weaver v. Tidwell**, 228 Ala. 169, 153 So. 218; Biennial Report of Attorney General, 1936-38, page 682.

It is my opinion that under the provisions of the above statute, the county governing body of Lamar County may legally appropriate county funds for the operational expenses of the hospital association referred to, if such appropriation has been recommended by the county health officer, endorsed by the county board of health, and approved by the county governing body. Such appropriation may be paid from the general fund of the county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 7, 1948.

Hon. R. T. Goodwyn, Jr.,
Chairman, Montgomery County
Democratic Executive Committee,
Montgomery, Alabama.

Elections—Opening of Ballot Boxes or Voting Machines and Recanvass of Results. Title 17, Sections 114, 116 and 363, Code of Alabama 1940.

1. The County Executive Committee, or any Sub-Committee thereof, is not vested with the authority to open ballot boxes or voting machines for the purpose of determining the correctness of the certificate of result furnished such committee by the election officials, in the absence of a contest of such election.

2. Such ballot boxes or voting machines may be legally opened by said county committee only in the event of a contest of the election or in the event the election officials concerned have failed or neglected to furnish said committee with a certificate of the result of said election for such box or precinct.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of June 2, 1948, is as follows:

"The Sub-Committee for the Montgomery County Democratic Executive Committee in tabulating the votes of the June first runoff primary find that in tabulating the Certificate of Results, for the various candidates, especially the Board of Revenue, in which two

candidates are to be nominated, that there are only two votes difference between two of the candidates. In view of the fact that in some of the voting machines and paper ballot boxes, the total vote was an odd figure, where there were four candidates, two to be elected:

"On behalf of the Montgomery County Democratic Executive Committee, has this Committee the legal authority to open the machines and paper ballot boxes in question, to determine the correctness of the Election Official's Certificate of Results, in the absence of a contest?"

In your request, you inquire as to the authority of the Montgomery County Democratic Executive Committee, or a Sub-Committee thereof, to open certain voting machines and paper ballot boxes in order to determine the correctness of the certificate of results furnished you by the election officials thereof, in the absence of a contest of such election. In my opinion, such committee possesses no such authority.

The statutes of this State governing the conduct of primary elections provide for the tabulation of votes, certification of the results thereof, the canvassing of such results, and public proclamation of same. It is provided by Title 17, Section 363, Code of Alabama 1940, that after tabulation of the results at each polling place, the inspectors shall forward to the Chairman of the County Executive Committee or other governing body of each political party participating in such primary election, one certificate of the result and one tally sheet and such envelope with those contents in it, together with the proper party ballot box, shall thereupon immediately be delivered to the returning officer, who shall keep the same securely in his possession and by noon of Thursday following the primary shall carry and deliver the box and envelope separately to the proper chairman of the county executive committees of the political parties participating in such primary, at the office of the probate judge of the county. After the result has been canvassed and declared by the county executive committee, the chairman of such county committee shall securely keep the ballot box, until it is known that there will be no contest, but in any event, not less than thirty days, and if in that time no contest has been properly instituted, such chairman shall then destroy the contents of such box without examining the same.

It is further provided by this same statute that such ballot box shall not be opened except in one or the other of the following events: First, in the event of a contest, where the opening of the box has been authorized under authority of the chairman of the executive committee trying the contest; and second, where a box has been returned but no certificate of the result of the election has been sent the chairman outside of the box. In such vent, the box may be opened by the chairman of the county committee, under the direction and in the presence of the committee, and the committee, for canvassing purposes, may obtain the result at any particular district, ward or precinct, from the contents of

the box, using the certificate of result contained therein, if any, or otherwise, so far as necessary in order to obtain it from the box after which the papers shall be returned into the box and the box be resealed by the chairman in the presence of the committee.

This, in my opinion, gives answer to your question relative to the authority of the county committee to open the paper ballot boxes in question for the purpose of determining the correctness of the certificate of results furnished you, in the absence of a contest of the election, and conclusively shows that the committee is vested with no such authority.

As regards the authority of the county committee to open the voting machines here in question, it is provided by the statutes of this State governing the use of voting machines, that after the closing of the polls on the day of election and the preparation of the Statement of Canvass by the election officials, the voting machines shall remain locked against voting for the time as provided by law for the filing of contests, and then shall have the seal broken only on the order of that body which, under the general provisions of law, now have charge of and control over ballot boxes in that county, and if, in the opinion of such body, a contest is likely to develop, shall remain locked for the time as provided by law for the filing of contests. Such machine is to be opened only on the order of a court of competent jurisdiction or on the order of any legislative body or governing body having jurisdiction over such election in which event the seal may be broken for the purpose of proper investigation and, when such investigation is completed, the machine shall again be sealed and across the envelope containing the keys shall be written the signature of the person or persons having broken same. Illegal and challenged ballots voted in connection with the operation of voting machines shall be preserved in the same manner and for the same length of time as now provided by law for other ballots. Title 17, Section 114, Code of Alabama 1940.

It is further provided that any persons now authorized by law may apply to the body which, under the general provisions of law, has charge of and control over ballot boxes, for an order to break the seals of the voting machines for the purpose of recanvassing the vote should such become necessary. In such event, the statutes applicable to the opening and recanvassing of paper ballot boxes become applicable and are to be followed in making such recanvass, and the voting machine is then to be resealed. As heretofore pointed out, such reopening of paper ballot boxes can only be accomplished in one of the two events heretofore mentioned. It is, therefore, my opinion that the county committee, or any sub-committee thereof, is not vested with legal authority to reopen the voting machine here in question for the purpose of determining the correctness of the certificate of results furnished you by the election officials in the absence of a contest of such election.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 7, 1948.

Hon. Haygood Paterson, Commissioner,
Department of Agriculture and Industries,
CAPITOL.

Act No. 410, S-138, General Acts 1947.

Appropriation under Act No. 410, General Acts 1947, may be used to pay salaries of employees engaged in carrying out provisions of the Act.

Opinion by Assistant Attorney General Miller.

Dear Sir:

Your request for an official opinion bearing date of May 12, 1948, is as follows:

"I respectfully request an official opinion on the following matter:

"Reference is made to Act No. 320, on page 183, of the General Acts of the Legislature of 1947, Section 1, sub-section X, item 10 (page 197), wherein the sum of $100,000.00 is appropriated to provide for a vaccination program and for matching Federal funds for the purpose of indemnifying owners of cattle which have been condemned or slaughtered, after having reacted to the tests for tuberculosis, paratuberculosis, or Bang's Disease. This Act was approved on August 15, 1947.

"Subsequently, the Legislature passed Act No. 410, approved September 25, 1947, appearing on page 298, of the General Acts of 1947, to provide for vaccination against Brucellosis, or Bang's Disease, of calves at State expense, in order to reduce the prevalence or to exterminate contagious abortion or Brucellosis (Bang's Disease) in cattle, and to appropriate funds therefor to carry out the provisions of this Act.

"The Department of Agriculture and Industries has several employees who are performing work as livestock inspectors and their salaries are being paid from the Agricultural Fund of this Department. In the performance of their official duties these employees devote, at least, 50% of their time to necessary work in connection with enforcement and carrying out the provisions of the Act for vaccination of calves against Brucellosis, or Bang's Disease.

"There are other employees who devote not less than 25% of their time to necessary work in connection with the Bang's Disease Control provided in the above mentioned Act. These employees are also paid from the Agricultural Fund.

"The money appropriated under Section 10, of Act No. 410, for carrying out the provisions of the Act is known as Bang's Disease Control Fund.

"In view of the fact that the above mentioned employees are devoting a substantial portion of their time to duties necessary in carrying out the provisions of Act No. 410, I should like to have your opinion as to whether a certain amount of the salaries and traveling expenses paid these employees may be paid from the Bang's Disease Control Fund, such amount to be determined by the actual time devoted to control of Bang's Disease, as provided under the above mentioned Act."

I am of the opinion that your inquiry should be answered in the affirmative.

Act No. 320, General Acts 1947, page 183, Section 1, sub-section X, item 10, (page 197) approved August 15, 1947, reads as follows:

"To provide for vaccination program and for matching Federal funds for the purpose of indemnifying owners of cattle which have been condemned or slaughtered, after having reacted to the tests for tuberculosis, paratuberculosis, or Bang's Disease - - - - $100,000.00."

By Act No. 410, General Acts 1947, page 298, approved September 25, 1947, the legislature provided for vaccination of calves against Bang's Disease at State expense and appropriated funds to carry out the provisions of this Act. Sections 1 and 10 of this Act read as follows:

"Section 1. The purpose of this Act shall be to reduce the prevalence or to exterminate contagious abortion or Bang's Disease and Brucellosis in cattle."

"Section 10. Appropriation.—There is hereby appropriated during each fiscal year, such part of the funds made available by the legislature for this purpose in the general fund appropriation Act as is necessary for carrying out the provisions of this Act. After a complete calfhood or other vaccination program provided in this Act has been finished in the State in each year, any part of this appropriation remaining may be used by the State Veterinarian to match Federal funds for indemnifying owners of cattle which have been condemned or slaughtered on account of having reacted positively to the test for tuberculosis, paratuberculosis or Bang's Disease." (Emphasis supplied.)

The declared purpose of Act No. 410, supra, expressed in Section 1 thereof, is "to reduce the prevalence or to exterminate Bang's Disease."

It can be seen from Section 10 of the Act that such part of the funds noted ($100,000.00 by general appropriation bill, Act No. 320,

supra) are made available as is necessary for carrying out the provisions of this Act.

Your inquiry indicates that the employees to which you refer are performing duties necessary to effectuate the purpose of Act No. 410. As noted, Section 10 of Act No. 410, provides that the funds appropriated are "for carrying out the provisions" of the Act.

In view of the plain language of Section 10, supra, it is my opinion that a certain amount of the salaries and traveling expenses paid to the employees in question may be paid from the funds appropriated by this Section, such amounts to be determined by the actual time devoted by these employees in the performance of duties necessary in carrying out the provisions of the Act.

Your attention is invited to an opinion of this office in Quarterly Report of Attorney General, Vol. 46, page 66, which holds that funds appropriated by the 1945 Legislature, Act No. 400, General Acts 1945, page 619, for the control of Bang's Disease for the fiscal years 1946 and 1947 could be used to defray any necessary expenses in carrying out the provisions of that Act. The views herein expressed are in accord with that opinion.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 7, 1948.

Hon. Brooks Glass,
Director of Commerce,
CAPITOL.

Insurance.

1. When a fraternal benefit society authorized to write the contingent endowment plan of insurance described in Title 28, Section 3, Code of Alabama 1940, converts itself into a stock life insurance company under the provisions of Title 28, Sections 236-244, Code of Alabama 1940, the conversion of such fraternal benefit society into a stock life insurance company has no effect upon its present authority to operate on said contingent endowment plan.

2. The stock life insurance company has the same authority to operate on such contingent endowment plan, subject to the limitations set out in Section 3, supra, as was possessed by the fraternal benefit society.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of May 17, 1948, is as follows:

"The Preferred Life Assurance Society has submitted to the Bureau of Insurance of the State Department of Commerce for consideration and approval a proposed plan to convert from a fraternal benefit society to a stock life insurance company in strict compliance with Article 2, Chapter 9, (Sections 236-244), Title 28 of the 1940 Code of Alabama. At the present time the Preferred Life Assurance Society is a fraternal benefit society authorized by law to operate on the contingent endowment plan described in those sections within the limits therein prescribed. If the Society is converted into a stock life insurance company, the effect of such conversion is described in Section 242 of Title 28 of the 1940 Code as follows:

" 'Such reorganized and converted corporation shall be deemed in law to be a continuation of such fraternal benefit society, whether the reorganization and conversion shall have been accomplished by the formation of a new corporation of the former society; and such reorganized and converted corporation shall succeed to and become invested with all and singular rights, privileges, franchises, and all property, real, personal or mixed, and all debts due on any account, and all other things in action, therefore belonging to such fraternal benefit society; and all property, rights, privileges, franchises, and all and every other interest, shall thereafter be as effectually the property of such reorganized and converted corporation as they were of the former fraternal benefit society; and the title to any real estate, by deed or otherwise vested in such former fraternal benefit society, shall vest in such reorganized and converted corporation and shall not in any way be impaired by reason of the conversion.'

"Title 28, Section 3, Code of Alabama 1940, prohibits any new Company, however, from selling contingent endowment policies. Now, therefore, before acting upon the proposed plan to convert the society into a stock life insurance company, I respectfully request your official opinion on the following questions:

"1. What effect, if any, will the conversion of the fraternal benefit society into a stock life insurance company have on its present authority to operate on the contingent endowment plan described in Code 1940, Title 28, Section 3?

"2. Will the stock life insurance company have the same authority to operate on such contingent endowment plan and within the same limits as now possessed by the fraternal benefit society?"

Title 28, Section 236, Code of Alabama 1940, provides that a fraternal benefit society organized and transacting business under the laws of Alabama may convert itself into a stock life insurance company, which may be a continuation of such society under an amended charter, if the society be then incorporated, or a new corporation formed for such purpose, if the society be then unincorporated.

The effect of such a conversion is clearly set out in Title 28, Section 242, Code of Alabama 1940, the pertinent part of which section is quoted in your request. Under this section, the reorganized and converted corporation "shall be deemed in law to be a continuation of such fraternal benefit society, whether the reorganization and conversion shall have been accomplished by the formation of a new corporation or by the amendment of the certificate of incorporation of the former society." Said section also specifically provides that "such reorganized and converted corporation shall succeed to and become invested with all and singular the rights, privileges * * * theretofore belonging to such fraternal benefit society; and all * * * rights, privileges, * * and all and every other interest, shall thereafter be as effectually the property of such reorganized and converted corporation as they were of the former fraternal benefit society."

The fraternal benefit society under consideration having the right and privilege under the statutes to write the contingent endowment plan of insurance described in Title 28, Section 3, Code of Alabama 1940, it is my opinion that, in view of the express provisions of Section 242, supra, the conversion of such fraternal benefit society into a stock life insurance company would have no effect on its present authority to operate on said contingent endowment plan.

In view of the conclusion reached in answering your first inquiry, it is my opinion that your second inquiry must be answered in the affirmative.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 9, 1948.

Hon. Ward W. McFarland, Director,
State Highway Department,
CAPITOL.

State Highway Department—Director of Finance—Division of Purchases and Stores—Lease-Sale Contracts.

Pursuant to Title 23, Section 29, Code of Alabama 1940, the Director of the State Highway Department may make lease-sale contracts for the purchase of road equipment for the use of the State Highway Department, provided said contracts are

approved by the Director of Finance, who may act only with the approval of the Governor.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of April 7, 1948, is as follows:

"Re: Lease Sale Contracts for Purchase of Road Construction Equipment and use by State Highway Department.

"The Highway Department has received a communication from the Department of Examiners of Public Accounts in which is recited an opinion of your office pertaining to lease sale contracts within this department and a construction of the opinion by Mr. Eagerton.

"We feel that your office has not been fully apprised of all of the facts together with such pertinent statutes in connection with this opinion and the purpose of this communication is to request further consideration of the opinion issued to Mr. Eagerton upon date of March 8, 1948. It is our considered opinion that none of the provisions of Title 55 are designed to interpret the operations of Title 23, Section 29, which section is a special section specifically provided for the Highway Department and it may be well to point out that such a statutory authority does not exist for other State Departments.

"Your attention is further invited to Chapter 4, Title 55, Code of Alabama, 1940, Section 108, in the last paragraph authority is vested with the Director of Finance as follows:

" 'All contracts not required to be approved by a named officer or officers by the constitution shall be subject to the approval of the Director of Finance, who may, however, provide for the automatic approval thereof by compliance with general rules or regulations promulgated by him.'

"Since Mr. Eagerton has specifically mentioned the execution of contracts which he claims to be contrary to the intent of above quoted sections, we hand you herewith an executed copy of a contract between the Leary & Owens Machinery Company, Inc., of Birmingham, Alabama, and the State Highway Department which is executed and approved pursuant to the statutes referred to above. Please return this contract to this office when it has served its purpose.

"Since all of the lease sale contracts are questioned by the Examiner of Public Accounts, we respectively request your official opinion as to whether or not lease sale agreements which have been

executed in accordance with Title 23, Section 29, and subject to the provisions of Chapter 4, Title 55, are legal and valid and binding upon the State of Alabama since all have been approved by both the Highway Director and the State Director of Finance."

The contract which you attached to your inquiry is a lease sale agreement for the purchase of some road machinery. The contract is between a named vendor and the Alabama State Highway Department. The instrument bears an inscription as follows: "Approved December 5, 1947. W. H. (Bill) Drinkard, Director of Finance."

It appears from your letter and the contract that the Division of Purchases and Stores, created pursuant to Title 55, Section 108, Code of Alabama 1940 with express authority, "To make and supervise the execution of all contracts and leases for the use or acquisition of any personal property," was by-passed so far as this and, as you say, similar purchases were made.

In making this and similar lease sale agreements, the State Highway Department assumed authority pursuant to Title 23, Section 29, Code of Alabama 1940, which reads as follows:

"§29. Highway department may construct or purchase buildings, tools, etc.—Subject to the provisions of chapter 4 of title 55 the highway department is authorized to rent, construct, or purchase such building, stock, machinery, tools, materials and other equipment as it may find necessary for use in carrying out the provisions of this chapter and pay for the same out of the state highway fund. It shall also, subject to the provision of chapter 4 of title 55, pay out of said fund the necessary expenses of the department of every description including traveling expenses of the officials and engineers, superintendents, foremen, and clerks, etc., while in the actual performance of their duties authorized or imposed by this chapter and also the cost of all supplies or materials furnished for said department and for the maintenance of all live stock and machinery used by the department or its agents."

The aforequoted section appeared in the Code of Alabama 1923 as Section 1335 and was reenacted, without change, as Section 35 of the Highway Act of August 23, 1927, Acts of 1927, pp. 359, 360. The right of the Highway Department to make purchases pursuant to the terms of this section was approved by the Supreme Court of Alabama in the case of **State Board of Administration et al. v. Roquemore**, 218 Ala. 120, 117 So. 757. The Court held that such authority was not restricted by the enactment of Section 14 of the Act of February 10, 1923, creating the State Board of Convict Supervisors, reading as follows:

"That the board of convict supervisors shall purchase all supplies for all departments and activities of the State, except educational, charitable and eleemosynary institutions, * * * under rules

and regulations which the board may adopt, with the approval of the Governor * * *." Acts of 1923, p. 71.

But the legislature, in 1940, approved the suggestion of the Code Committee and revised said Section 29, supra, by ingrafting thereon the following: "Subject to the provisions of Chapter 4 of Title 55 * *," following which words the remainder of said aforequoted section 29 now appears.

The question now presented is the effect of the aforequoted restrictive words upon the right of the State Highway Department to make lease sale purchases which they were authorized to do (and which has been an administrative practice for a number of years) by said decision of the court in the case of **State v. Roquemore,** supra.

In an opinion of this office dated December 30, 1947, (Ms.), to Hon. Ralph P. Eagerton, Chief Examiner of Public Accounts, Capitol, it was observed as follows:

> " * * * Under the statutes governing this department, the Director of Finance has full and final responsibility for the discharge of all of the functions and duties of the Department, with power and authority commensurate with his responsibility. Although in discharging this responsibility, he, of necessity, usually acts through duly appointed officers, agents, or employees, their authority stems from him, they act in his behalf, and their official acts are subject to being affirmed or reversed by him. He is invested with all the power and authority of his subordinates, and may reassign the functions and duties of any particular division in his department in such a manner as his best judgment dictates, giving the functions and duties so reassigned to another division or discharging them himself, * * * *.
>
> "Consequently, I am of the opinion that the Director of Finance has the authority, with the approval of the Governor, to withdraw from the Division of Purchases and Stores of the Department of Finance the normal functions and duties of purchasing all personal property (with an exception not here material), and making and supervising the execution of all contracts and leases for the use and acquisition of any personal property and **reassign such functions and duties to himself, as Director of Finance.**" (Emphasis supplied).

The re-enactment of Section 23, supra, after the Department of Finance was created, continuing the authority of the State Highway Department to make certain purchases, in my judgment, gives legislative permission to the Highway Department to make these purchases, but subject of course to the provisions of Chapter 4 of Title 55, Code of Alabama 1940.

I further conclude that the intent of the legislature was to bring all such contracts executed by the Highway Department under the super-

vision of the Department of Finance in furtherance of a coordinated plan to focus the finances of the State in one department. It was not the intention of the legislature to deprive the State Highway Department of all voice in the matter of such purchases, but to leave them a measure of authority with respect thereto. The Highway Department is not, in my judgment, compelled to participate in such purchases, but may surrender its authority in such instances as it deems best to the Finance Department.

Who has the right to act for the Department of Finance? As said in a recent opinion of this office dated March 8, 1948 to Hon. Ralph P. Eagerton, Chief Examiner of Public Accounts, the Division of Purchases and Stores is given legislative authority to make such purchases. Express authority therefor appears in Title 55, Section 108, Code of Alabama 1940. The request in response to which this opinion was written contained no statement of facts, as here, that the contract executed by the State Highway Department had been approved by the Director of Finance, nor was such fact considered in the opinion. In such respect, the facts in that case differ from the facts now under consideration, and such difference is significant in the construction of the authority of the Highway Department to make purchases.

It is my opinion that the Director of Finance, with the approval of the Governor, is vested with lawful authority to withdraw from the Division of Purchases and Stores all right to supervise the purchases and lease sale contracts proposed by the State Highway Department, and he has the right, with such approval of the Governor, to approve the contracts made by said Highway Department, and upon such approval (the Governor having given such authority) the contract, if otherwise regular, becomes legal and binding upon the State of Alabama. As I have said, it was not the intention of the legislature to deprive the State Highway Department of its authority under Section 29, Title 23, supra, and vest the same exclusively in the Department of Finance and to exclude the Highway Department, without any option, from participating in the purchases or lease of articles and equipment, in many instances of a specialized and technical class, to be used by it.

I call attention to the fact that the approval of the Governor is not required under the law to take any particular form, and may be either written or oral. But such approval must have been given to the Director of Finance. However, for the sake of a record, it is advisable that the Governor's approval, or a confirmation of his action, be in writing.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 10, 1948.

Hon. O. H. McRight, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery 2, Alabama.

Russell County—Statutes—Constitution—Alabama Alcoholic Beverage Control Board—Municipalities.

1. Any provision of a local law that provides for the distribution of state-shared revenue to a political sub-division of the State, on the basis of a census taken by the local unit of government, pursuant to authority of the local act, while other political sub-divisions of the state participate in such revenue, pursuant to the provisions of a general law that fixes a decennial or other federal census as the basis of distribution, violates Section 105 of the Constitution of Alabama 1901, and is void. Act No. 542, Local Acts of 1947; Act No. 255, General Acts of 1943, pages 226-27; Constitution of Alabama 1901, Section 105.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion dated March 2, 1948 is as follows:

"We request your opinion as to the correct enumeration of population of the City of Phenix City, Alabama, for the purpose of allocation and payment of A. B. C. Stores profits to that city.

"Title 29 of the 1940 Code of Alabama provides that payment to incorporated municipalities on the basis of population should be determined according to the latest federal decennial census.

"An Act of the Legislature No. 542 (S. 386) approved October 8, 1947 provides for a special census of all persons residing within the corporate limits of the City of Phenix City and that such census would be the official census for the re-classification of such city under any law requiring classification based on population until the 1950 regular federal census.

"We desire to know which census should apply with reference to the distribution and payment of A. B. C. Stores profits."

Local Act No. 542, to which you refer, reads as follows:

"Section 1. The governing body of the City of Phenix City, Russell County, Alabama, is authorized and directed to prepare, or cause to be prepared, a census of all persons residing within the corporate limits of such municipality and to pay the expenses of same out of the City Treasury.

"Section 2. The reports of enumerators appointed under this Act shall be made under oath to the governing body of the city, and when the census is completed, each member of the governing body of the city shall certify to the result thereof and file the same with the Secretary of State.

"Section 3. The census authorized by this Act, when taken, certified, and filed as required herein, shall be the official census of and for the City of Phenix City, Alabama, for the purpose of reclassification of such municipality under any law requiring classification based on population until the 1950 regular Federal census. That said census shall be taken and enumerated by wards, districts, and divisions of the city and shall be so certified and filed as herein required.

"Section 4. The provisions of this Act are severable. If any part of the Act is declared unconstitutional or invalid, such declaration shall not affect the part which remains.

"Section 5. All laws or parts of laws in conflict with this Act are repealed.

"Section 6. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

"Approved October 8, 1947."

Act No. 255, General Acts of 1943, p. 226, makes provision for the distribution of net profits from the operations of Alabama Liquor Stores, with specific provision that certain profits above two million dollars, up to and including two hundred thousand dollars from such operations, "shall be apportioned among, and paid to, the several incorporated cities and towns in Alabama on the basis of the ratio of population of each such city or town to the total population of all cities and towns******." It further provides (section 2, near the bottom of page 227) that "Populations shall be ascertained for the purpose of distribution under this Act according to the last decennial Federal Census next preceding commencement of calendar year for which distribution is made."

The obvious purpose (among others) of the local act, supra, is to provide a new census classification for Phenix City and to obtain for it an increased participation in liquor profits and other state-shared revenue distributed on a population basis. This increase would be deducted from such like revenue available to other cities and towns in Alabama that are anchored under the general law to a decennial or other federal census mandatorily used as a basis of distribution.

Thus this law, by providing Phenix City with a different basis of classification from other cities and towns operating under the general law, actually or potentially transgresses the local boundaries of Phenix City and deprives other local units of government in Alabama, not so

favored with a local law of like operation, of their full measure of state-shared revenue distributed on a classification basis under the general law.

What effect does section 105 of the Constitution of Alabama have upon the aforementioned local law? This section reads as follows:

> "Sec. 105. No special, private, or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law, or when the relief sought can be given by any court of this state; and the courts, and not the legislature, shall judge as to whether the matter of said law is provided for by a general law, and as to whether the relief sought can be given by any court; nor shall the legislature indirectly enact any such special, private, or local law by the partial repeal of a general law."

It is my opinion that this constitutional provision proscribes the operation of section 3 of the local act, supra, to the extent that the classification provided under the terms of the Act cannot be used as a basis for participating in liquor store profits or other state-shared revenues which the general law distributes to cities and towns in Alabama on a basis of population levels ascertained by a decennial or other federal census.

I am not unmindful of a recent decision of the Supreme Court of Alabama, in the case of **Lawrence G. Steadman vs. Lamar Kelly et al,** as members of Alabama Alcoholic Board, (Ms), wherein Justice Stakely, writing for the Court, observed as follows:

> "The Alabama cases hold that 'Section 105, as repeatedly held by this court, does not inhibit local legislation on subjects not enumerated in section 104, where the object of the local law is to accomplish an end not substantially provided for an effectuated by a general law, notwithstanding there is a general law dealing with the subject or system affected by the local law.'—**Polytinsky v. Wilhite,** 211 Ala. 94 (95), 99 So. 843; **State v. Prince,** 199 Ala. 444 (447), 74 So. 939; **Board of Revenue v. Kayser,** 205 Ala. 289, 88 So. 19; **Jackson v. Sherrod,** 207 Ala. 245, 92 So. 481; **Dunn v. Dean,** 196 Ala. 486, 71 So. 709; **Riley v. State,** 209 Ala. 505, 96 So. 599; **Brandon v. Askew,** 172 Ala. 160, 54 So. 605. Nor does §105 prohibit additional and supplemental local laws to meet local needs substantially different from general law.
>
> "In the case of **Standard Oil Company v. Limestone County,** 220 Ala. 231, 124 So. 523, this court said:
>
> " 'Section 105, above, has been often considered by this Court. Suffice to say, it is fully settled that this section does not forbid local legislation on subjects not prohibited by section 104, merely because a general law deals with the same matter. If, in the judgment of the legislature, local needs demand additional or supple-

mental laws substantially different from the general law, the legislature has power to so enact.'

"See also **Talley v. Webster**, 225 Ala. 384, 143 So. 555.

"In **Talley v. Webster, supra**, this court held that a local act changed the general act which regulated the jurisdiction of suits in justice courts in Mobile County. In that case in holding the local act constitutional with reference to §105, this court said:

" 'We need not review the numerous cases construing this section. Suffice to say it does not inhibit the passage of local laws, not prohibited by section 104, merely because such local law is different, and works a partial repeal of the general laws of the state in the territory affected.'

"See also **Walker County v. Barnett**, 247 Ala. 418, 24 So. 2d 665."

The local laws under consideration in the cases cited in this opinion set-up a pattern of local governmental operationss that do not transcend the boundaries of the political subdivision covered by the Act, and in that respect these laws differ from the local Act that authorizes the governing body of Phenix City to take a census, which may be used to provide this city with increased participation, while other cities and towns, with a comparable increase in population since the last decennial federal census must yield some of their revenue to the verdict of this (local) census.

To hold that it was within legislative competence under section 105 of the Constitution to prescribe a local rule of participation for Phenix City—a rule different from the existing general rule applying to other cities and towns of Alabama—would probably lead to confusion and innumerable conflicts, following the enactment of other local laws with varying rules of distribution which could defy administrative solution.

Therefore, I conclude that section 105 of the Constitution inhibits local legislation, as here, that proscribes a local rule for distribution of state-shared revenues when there is in existence a general law covering the subject. The inhibitions of this section assures all local units of government a uniform pattern for such distribution and prevents one local unit, through the agency of a local law, from obtaining any financial advantage of other local units of government.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 14, 1948.

Hon. Ward W. McFarland,
State Highway Director,
Highway Department,
Montgomery 4, Alabama.

Highways—Contractors—Federal Aid Public Works—State Licensing Board for General Contractors.

1. The Highway Director, under the provisions of Section 3 of Act No. 492, General Acts 1947, page 332, must receive bids for Federal aid highway construction from any responsible contractor provided the regulations for carrying into effect Federal Aid Highway Act of 1944 so require.

Opinion by Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of March 3, 1948, is as fololws:

"Reference is made to an opinion issued by your office under date of December 18, 1947, relative to qualifications prescribed by the State Licensing Board for General Contractors.

"We are now advised by the District Engineer of the Public Roads Administration that the Washington Office of that agency has issued a memorandum calling attention to the fact that for the State to consider bids for highway construction only if they come from licensed contractors is in direct conflict with Section 1.10(d) of Federal regulations for carrying into effect the provisions of Federal Aid Highway Act of 1944 and Federal Aid Road Act of July 11, 1916, as amended and supplemented. For your information, I am quoting Section 1.10(d) of such regulations:

" 'No procedure or requirement shall be approved which, in the judgment of the Administrator, is designed or may operate to prevent the submission of a bid by, or the award of a contract to, any responsible contractor, whether resident or non-resident of the State wherein the work is to be performed, such as laws or regulations which require the licensing of a contractor before he may submit a bid or which prohibit the consideration of a bid submitted by a contractor not so licensed, or rules which govern the pre-qualification of contractors by which the amount of work that may be awarded to a contractor is limited otherwise than by a full and appropriate evaluation of his experience, equipment, financial resources and performance record.'

"Such regulations do not prohibit the requirement that a contractor be licensed before he is awarded a contract by the State but

it is considered in conflict with such regulations for the State to require the licensing of a contractor before he submits a bid. In view of the conflict with Federal regulations, is the Highway Director required to accept bids only from licensed contractors on Federal Aid Highway projects?"

The opinion of this office, dated December 17, 1947, addressed to you, holding that only licensed contractors are eligible to bid on highway construction, should be modified so as to exclude therefrom bids on highway construction in which the Federal Government participates and which is amenable to the rules and regulations promulgated by the Administrator of the United States Administration of Public Roads.

In my judgment, it was not the intention of the Legislature to enact a law that conflicts with the rules and regulations of the United States Public Roads Administration governing the reception of bids or prescribing the qualifications of the bidders, the result of which would deny to Alabama federal participation in our highway construction.

The Legislature, in Act No. 492, General Acts 1947, page 338, Section 11 thereof, recognized rules and regulations of the United States Public Roads Administration by adding thereto the following:

"Nothing in this section shall be interpreted to conflict with the rules and regulations of the Public Roads Administration."

The Legislature, at the time of the enactment of Act No. 492, supra, was well aware that the State of Alabama had theretofore been receiving millions of dollars from the Federal Government to aid in road construction in Alabama; that such aid would continue for an indefinite time; and also they knew that no doubt these contributions had been made, and would continue so to be made, under rules and regulations of said administrator, and that the states must conform to such rules and regulations or else be excluded from the benefits. That recognition is quite apparent in the aforequoted last sentence of Section 11 of said Act No. 492, supra.

Although there is no specific provision in Act No. 492, supra, to which such legislative recognition of rules and regulations of the Administration of Public Roads of the United States Government may be definitely tied, yet in the light of public road history in Alabama and the amount of participation therein by the Federal Government, all of which, as I have said, was familiar to the Legislature of 1947, it is my opinion that the Legislature did not intend to preclude full recognition and obedience to the rules and regulations of the Public Roads Administration of the United States Government so far as these rules and regulations prescribe the qualifications of bidders on federal aid highway projects.

The opinion of this office to you, dated December 17, 1947, is modified, to the end that bids submitted by all responsible bidders, conforming to the rules and regulations you mention, may be received and considered.

Nothing in this opinion shall be construed to hold that the Highway Director of Alabama may not prescribe that the responsible bidder whose bid is received will not have to qualify as a licensed contractor under the laws of Alabama as a condition precedent to award of the bid. That question is not presented in your inquiry, and we, therefore, pretermit discussion thereof.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 14, 1948.

Hon. Silas D. Cater, Senator,
Member of Legislature,
Montgomery, Alabama.

Sales Tax—Taxation—Exemption—Machines—Foshee Carrier.

The sale of a Foshee Carrier used in manufacturing and processing lumber is exempt from the Alabama Sales Tax Act, Act No. 303, General Acts Regular Session 1947, p. 155, approved August 13, 1947.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

Your request for an official opinion received by this office on February 13, 1948, is as follows:

"It is respectfully requested that you give me your opinion as to whether or not the Foshee Carrier, a device made exclusively for use in the processing or manufacturing of lumber, is subject to the Alabama 2% Sales Tax.

"This device, a picture of which is enclosed, consists of a channel steel frame mounted on wheels, and having no bottom and being open at the rear end, with hydraulic lifting bars whereby when the device is backed over a stack of lumber as it comes from the saws, and the hydraulic lift put in motion, the lumber is raised a few inches off the ground, and then moved to the drying racks or kiln. This operation is then reversed and the load deposited on the ground where it is placed in the drying racks, or if it is to be put in a dry kiln the entire load can be deposited in the kiln, and the device removed for further use.

"The device as distinguished from a finished lumber carrier with four wheels, is not self-propelled, but is used in connection with an independent source of power such as a tractor or dragline. It is

so designed that a power unit can be mounted upon the device itself to provide for actuation of the hydraulic mechanism.

"This carrier is primarily designed for use in the manufacture and processing of lumber and is not fitted for other purposes.

"We feel that this device comes squarely within the exemption contemplated by the law, which provides that no tax shall be levied upon the sale of machinery or devices which are used in the manufacture or processing of any tangible personal property.

"It would seem that the exemption must apply if (a) this device is used in the manufacture of tangible personal property, or, (b) this device is used in the processing of tangible personal property. As there can be no question that lumber is tangible personal property, we go on to the question of whether or not the device is being used in the manufacture of lumber. What is manufacture? Generally speaking it may be said that manufacture consists in the application to materials or things, of labor or skill, or work, whereby the original material is changed to a new, different, or more useful article. There can be no question that the sawing of a great log into boards or timbers and the fitting of these boards and timbers as the same fall from the blade of the saw, into a form useful for commerce, is the manufacture of lumber, and it has always been so held. It could not successfully be said that the saw blade which cuts the log is engaged in manufacture, and that the conveyor belt or chain which carries the plank or timber to the place of stacking, or to the drying kiln, is engaged in manufacture, but that the device which moves these same boards to the drying rack or kiln in place of a conveyor belt or chain, is not engaged in manufacture.

"It is true that the Foshee Carrier makes for more efficient operation and reduces labor costs, and speeds up work, but so does the steam engine or diesel unit, or electric motor, or other source of power which drives the saw, also make for reduced operating cost and greater speed, as before these improvements came along the logs were sawed by hand, and there is no question but that the saw and the motor are used in the manufacture of lumber and so are exempt.

"It seems well established that the word processing, means a method employed to produce a certain end result, or effect, or a mode of treatment, or a continuation of a series of correlated mechanical steps in manufacture. In this instance, the lumber is first sawed into boards or timbers, then resawed approximately to size and trimmed, then dried either by air or in a kiln, then dressed and finished. Each one of these steps is a process in the manufacture of the completed article and in these steps, and indispensably a part thereof, the lumber is moved from the saw to the edger, from the edger to the rack or kiln, from the rack or kiln to the planer, and not until the end of this last operation, is it ready for shipment in

commerce. The conveyor chain which moves the log from the mill-pond or yard to the saw and the Carrier which moves the planks from the saw to the edger are each part of the manufacturing process and seem indistinguishable. The fact that the Carrier moves on the yard is of no more import than the movement of the saw or of the conveyor chain on its stationary bearings.

"While, of course, not binding on your decision, but indicating the position taken by the Treasury Department upon a request for an opinion as to whether the Foshee Carrier was subject to the Federal 5% Excise Tax imposed on units used for transportation of materials, we give the substance of a ruling by the Commissioner of Internal Rvenue of Washington, D. C. dated December 22, 1947 which held that the device was **not subject to the excise tax,** in that the said Carrier was primarily designed for moving lumber on the lumber yard and was not suitable for transportation of property elsewhere.

"If there is any further information desired, or questions which may come to your mind, please advise and I will be glad to supply any available data."

It is my opinion that the sale of the Foshee Carrier, constructed and used as described by you, is exempt from taxation under the Alabama Sales Tax Act, Chapter 20, Article 10, as amended, Code of Alabama 1940.

The production of finished lumber is manufacturing and processing of tangible personal property. **Nash v. State,** 21 Ala. App. 613, 110 So. 797.

As described by you in your request for an opinion, the Foshee Carrier is a machine used in processing and manufacturing tangible personal property.

Act No. 303, General Acts Regular Session 1947, p. 155, approved August 13, 1947, Subsection (p), exempts from the provisions of the Sales Tax Act and from the computation of the amount of tax levied thereby: "The gross proceeds of the sale of machines used in * * * * processing and manufacturing of tangible personal property * * * *."

Of course, if the use of this Carrier is limited to operations prior or subsequent to the manufacturing and processing of the lumber, this opinion is not applicable, as the use of the machine would not then fall within the terms of the exemption.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 14, 1948.

Hon. E. T. Knight,
Chairman,
Cullman County Board of Revenue,
Cullman, Alabama.

Counties—Hospitals.

The $45,000 surplus of the proceeds of Cullman County's special tax of 2½ mills levied under Constitution of Alabama 1901, Section 215(a), for construction of a jointly owned county-city hospital, may lawfully be used for construction of an addition to the hospital, provided provision has been made and funds accumulated for payment of accruing interest and principal payment at maturity of $48,000 hospital bonds now outstanding.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of March 26, 1948, is as follows:

"We have an application in, and expect to receive Government aid in building an addition to our present hospital. The City and County built this hospital on a 40-60 basis (60% County's part).

"There is a special levy of 2½ mills set up whereas ½ mill takes care of the hospital indebtedness. We have $45,000.00 in Government Bonds in this special Hospital Fund at present. What we wish to know is can we use this $45,000.00 in helping to build the addition?

"Your very prompt reply to the above question will be very much appreciated."

The hospital under consideration was constructed under the provisions of Title 22, Section 189, Code of Alabama 1940. A hospital board for Cullman County was created by Act No. 226, Local Acts 1939, page 129. This act provides for the equipment and operation of the hospital.

The special constitutional tax of one-fourth of one per centum was levied and collected under the authority of the Constitution of Alabama 1901, Section 215(a), and Title 12, Section 186, Code of Alabama 1940, allowing the levy of such special tax for the construction of necessary public buildings, bridges, and roads. A county hospital comes within the meaning of the term "necessary public buildings" as used in Section 215(a), supra. Quarterly Report of Attorney General, Volume 49, page 120.

From your former request for the opinion found in Quarterly Report of Attorney General, Volume 38, page 52, it is apparent that one-half

mill of the two and one-half mill tax levied, was pledged to retire interest and principal of $48,000 of hospital bonds. This being true, no part of the said one-half mill can be used for any purpose other than paying the bonds and interest thereon.

Therefore, I assume that the $45,000 in United States Government Bonds now accumulated in your "Special Hospital Fund" represents surplus accumulated from the remaining two mills of the two and one-half mill tax levied under Section 215(a), supra. I further assume that this surplus is unencumbered and that no part has been pledged towards the payment of any other public indebtedness and, in speaking of "surplus," I assume that the sinking fund now contains, in addition to the said $45,000, the sum of $48,000 with which to retire, at maturity, the original bond issue.

In an opinion rendered the Judge of Probate of Dale County, it was held that the surplus from such two and one-half mill tax levied for construction of necessary public buildings, bridges, and roads could lawfully be used for the construction of a county hospital, in cooperation with the United States Government under the so-called "Hill-Burton Act," after provision has been made for the payment of the interest on and the retirement of the principal of bonds to the payment of which the proceeds of the said tax were pledged. Quarterly Report of Attorney General, Volume 49, page 104.

If I am correct in my assumptions, it is my opinion that surplus can legally be used in partial liquidation of the cost of an addition to the hospital.

The conclusion reached herein is not in conflict with the opinion rendered to you on March 19, 1945, and found in Quarterly Report of Attorney General, Volume 38, page 52, wherein it was held that no part of the tax levied could be diverted towards the purchase of a nurses' home, it not then appearing that a surplus was involved and that funds had been accumulated for retirement of accruing interest and principal payment in full, at maturity, of the $48,000 of bonds outstanding.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 15, 1948.

Hon. Ward W. McFarland,
State Highway Director,
Highway Department,
Montgomery 4, Alabama.

State Highway Department—Director of Finance—Division of Purchases and Stores—Rental Contracts.

By authority of Title 23, Section 29, Code of Alabama 1940, the Director of the State Highway Department may make contracts for rental or lease of equipment to be used in the transportation of materials for highway construction or maintenance, provided such contracts are approved by the Director of Finance, who may act only with the approval of the Governor.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of April 27, 1948, is as follows:

"Following a procedure used by this department for many years, this department under various dates during the first part of 1948 and the latter part of 1947 entered into rental agreements under the provisions of Title 23, Section 29, Code of 1940, with the following contractors or agencies:

"Mr. T. E. Reid, Linden, Alabama

Mr. J. C. Hearn, Collinsville, Alabama

Mr. W. C. Padgett, Andalusia, Alabama

Walker County Board of Revenue, Jasper, Alabama.

"As specifically agreed, this department has been using equipment in its operations of transporting materials for maintenance and construction of State highways. This particular type of rental is very advantageous in alleviating serious emergencies arising out of this department's inability to adequately provide transportation for its materials in these particular localities. This practice is predicated on the department having exercised this authority for the past 25 years. It has been found most economical by the department, in many instances, to lease equipment for a particular job than to purchase the equipment through the procedure established under Title 55, Code of 1940.

"Until recently there has been no question as to whether or not this department was within its authority to make such agreements. Our auditor recently prepared the regular monthly pay roll vouchers to cover the rental of equipment from the above contractors and submitted same to the State Comptroller for payment. Since submission of these vouchers to the State Comptroller, we are advised that the comptroller has refused to pay these four rental pay roll vouchers without instructions from the Chief Examiner of the Department of Examiners of Public Accounts. Copies of these pay roll vouchers are attached.

"We are fully aware of General Act, Number 351, which established the Department of Examiners of Public Accounts but do not

find within said act any authority for the withholding or stopping payments of any contract which has been entered into pursuant to statutory authority under which this department operates.

"It is requested that your office render us an official opinion as to whether the State Comptroller may legally refuse to pay the above mentioned rental invoices.

"The inability or the failure on the part of this department to make payment in the above cases is threatening the above mentioned parties with financial difficulty and is resulting in considerable confusion and delay in our own operations. It is therefore requested that this matter receive the earliest possible attention."

I understand from your inquiry above set forth that your Department entered into an agreement with certain designated persons for the rental or lease of equipment used in the transportation of materials for the maintenance and construction of state highways. You have attached to your inquiry photostatic copies of rental invoices for such equipment and wish to know if the State Comptroller may legally pay these invoices.

Payment of these invoices may be made pursuant to an opinion of this office, dated June 9, 1948, to you, wherein it was held that the Highway Department may make lease sale contracts, provided such contracts are approved by the Director of Finance, who may act only with the approval of the Governor. These rental agreements which you mentioned in your inquiry before me, as a condition precedent to payment, must have been approved by the Director of Finance, and only then if the Governor has given his approval.

Your attention is directed to the fact that the approval of the Governor is not required under the law to take any particular form, and may be either oral or written, but such approval must be given to the Director of Finance. However, for the sake of the record, it is advisable that the Governor's approval, or a confirmation of his action, be in writing.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 15, 1948.

Hon. J. C. McGough,
Judge of Probate,
Fayette County,
Fayette, Alabama.

Highways — Court of County Commissioners — Insurance — Bridges—Gasoline Fund.

1. County governing body has authority to carry fire insurance on a county bridge.

2. Premiums on fire insurance on a county bridge may be paid out of the gasoline tax fund of the county.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of March 3, 1948, is as follows:

"For more than two years, Fayette County has been carrying $50,000.00 of fire insurance on the creosoted wood bridge across Sipsey River on the Fayette-Townley Road, now under construction, about seven miles North of Fayette, Alabama, and paying the premium thereon out of the Gasoline Fund. The State Examiners have raised the question of legality about this insurance, and especially with respect of paying the premium thereon out of the Gasoline Fund.

"Therefore, you are requested to rule upon the following question.

"1. Does Fayette County have the legal right or authority to carry fire insurance on such a bridge?

"2. If so, out of what fund or funds may the premium thereon be paid?

"Your prompt reply will be much appreciated."

In my opinion, your county governing body has ample authority to carry fire insurance on such a bridge.

Title 23, Section 43, Code of Alabama 1940, provides as follows:

"Powers of courts of county commissioners with regards to roads, bridges and ferries.—The courts of county commissioners, boards of revenue, or other like governing bodies of the several counties of this state have general superintendence of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end they have legislative, judicial, and executive powers, except as limited in this chapter. Courts of county commissioners, boards of revenue, or courts of like jurisdiction are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state. They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts, or boards, to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their

respective counties, and regulate the use thereof; but no contract for the constructoin or repair of any public roads, bridge or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than ten years."

The powers granted to county governing bodies by the above quoted section are sufficiently comprehensive to include the carrying of fire insurance on such a bridge.

"Where boards of revenue, and like bodies, exercise legislative jurisdiction, and such action is within the express or implied terms of the act granting the power to them, and there is an absence of 'fraud, corruption or unfair dealing,' our courts are committed to the doctrine that in no case involving the exercise of discretionary power will their action be controlled by any judicial tribunal." **Henry v. Rogers,** 19 Ala. App. 376, 97 So. 427.

In reference to your second inquiry, please be advised that Title 51, Section 657, Code of Alabama 1940, as amended by Act No. 20, General Acts 1943, page 20, provides in part that the county's part of the gasoline tax therein provided for shall be expended as follows:

"* * * and said funds shall be used by the several counties of the state exclusively for the construction, maintenance, supervision and policing of the public roads and bridges in the respective counties; * * *."

By Title 23, Section 43, supra, a county governing body possesses original and unlimited jurisdiction in relation to the establishment, maintenance, and construction of roads and bridges in the county. I, therefore, advise you that your county governing body has unlimited jurisdiction as to the expending of the gasoline tax funds received by it as long as they are expended exclusively in the construction, maintenance, supervision and policing of roads and bridges in the county, and may pay premiums for fire insurance on a county bridge from such funds.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 15, 1948.

Hon. W. L. Brown, Chairman,
Board of Revenue,
Shelby County,
Columbiana, Alabama.

Counties—Mileage.

Under the provisions of Section 6771, Code of Alabama 1923, as amended by Act No. 662, General Acts 1939, page 1049 (Title

12, Section 28, 1945 Cumulative Pocket Part, Code of Alabama 1940), the members of the Board of Revenue of Shelby County are entitled to five cents per mile for each mile necessarily traveled in the discharge of their duties in respect to public roads and bridges of the county.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of June 10, 1948, is as follows:

"We shall appreciate your official opinion in the following matter:

"The Board of Revenue of Shelby County, was created under Local Acts 134 of 1911, which states the salary of said board shall be $4.00 per day while actually engaged in the performance of the duties of their office. The local act referred to above does not allow any mileage for road services, however. Section 6 of said act states that all general laws hereafter enacted shall apply and govern.

"Title 12, Section 27, Code of Alabama 1940 provides 5¢ per mile while engaged in road supervision, which was enacted after the above local act was passed.

"Would it be legal under the above quoted sections to pay the members of this board 5 cents per mile under the above acts.

"Your prompt attention will be appreciated."

Pretermitting a consideration of the constitutionality of Act No. 134, Local Acts 1911, page 154, as amended, and Act No. 21, Local Acts 1933, page 9, it is my opinion that, under the provisions of Section 6771, Code of Alabama 1923, as amended by Act No. 662, General Acts 1939, page 1049 (Title 12, Section 28, 1945 Cumulative Pocket Part, Code of Alabama 1940), the members of the Board of Revenue of Shelby County are entitled to five cents per mile for each mile necessarily traveled in the discharge of their duties in respect to public roads and bridges of the county.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 17, 1948

Hon. W. H. Drinkard,
Director of Finance,
CAPITOL.

State—Department of Finance—Mail—Stamps.

1. Under Title 55, Section 145, Code of Alabama 1940, the present operation in regard to furnishing stamps to the various State departments for emergency purposes is valid.

2. Fieldmen traveling for the State are authorized to purchase stamps for official business and may be reimbursed on expense accounts.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of May 18, 1948, is as follows:

"Referring to an opinion by the Attorney General, dated May 10, 1939, and included in Volume 15 on page 111 of the Attorney General Reports, relative to Title 55, Section 145, which section, in part, refers to the setting up of a Central Mailing Room, we wish to concur in your judgment 'it was the purpose of the legislature in enacting this provision to prevent the unnecessary expenditure of state funds for mailing purposes and to circumvent the use of state postage for personal or private use.'

"It has been necessary, under emergency conditions, to place important mail covering important state business in the post office late at night several hours after the regular closing hours of the Central Mailing and Supply Room. In order to meet this emergency, the procedure has been adopted by the Director of Finance that any department head could request in writing postage stamps to be used for official state business and the stamps could be issued to him under the supervision of the Central Mailing Room on authority of his statement that the stamps were to be used in accordance with the intent of Title 55, Section 145, as has been outlined by your office.

"As an example of such an emergency, it is recalled by the Mail and Supply Room that on January 9th a request for emergency postage was received from the State Comptroller with the information that some time around midnight the work in that office would be completed on the Federal Withholding Tax Statements of the gross earnings and amount withheld on all of the Circuit Judges, County Solicitors, and other officials of the State and that these forms should be immediately placed in the mail upon their completion at that late hour. To do otherwise would have required the

forms to be held over the weekend until Monday and placed in the mail to reach these officials some three or four days later. We want to point out that it would have been useless and unreasonable for the Mail and Supply Room to have remained open to handle this emergency which occurred in the Comptroller's Office and to remain open to provide for similar emergencies that do occur in all of the state offices from time to time.

"As another example of such an emergency, it is recalled by the Mail and Supply Room that the Department of Examiners of Accounts made a request of a certain number of 3¢ stamps to be used on envelopes to contain replies, self-addressed to their department, return postage paid. On this occasion these stamps were furnished on authority of the statement by that department head that the stamps would be used for official state business.

"We use the two examples mentioned above to show that there is no practicable solution to handling these postage requirements other than through the method now employed.

"We submit that, evidently, the basis for the authority of this procedure is analogous with the authority stated in the opinion by the Attorney General referred to above and that this procedure is also supported by many years of precedents without question and we should like very much to have your official opinion as to the validity of this operation.

"This official request for an opinion of your office raises an additional question on a procedure backed by precedent of many years and that is the purchase of postage stamps, to be reimbursed on expense accounts, by fieldmen traveling over the State of Alabama and required to purchase these stamps in order to furnish the state with required reports and information, which information the state would have no means of gathering other than through this method. Therefore, while the matter is being studied by your office, we request that your official opinion also cover this point."

In answer to your first inquiry, it is my opinion that the present operation in regard to furnishing stamps to the various State departments for emergency purposes, as outlined in your letter of inquiry, is valid. Title 55, Section 145, Code of Alabama 1940, provides in pertinent part as follows:

"There shall be in the department of finance the division of service, which shall be headed by and be under the direction, supervision and control of an officer who shall be designated the chief of service, to be appointed by the director of finance, with the approval of the governor. The functions and duties of the division of service shall be as follows: To provide for the stamping and mailing for each state department, board, bureau, commission, agency, and office located and operating in the city of Montgomery, and

operate a central mailing room or rooms and service for said departments, boards, bureaus, commissions, agencies, and offices. The director of finance shall direct the delivery of mail to such mailing room or rooms by such of said departments, boards, bureaus, commissions, agencies, and offices as he may see fit, ready to be delivered to the United States post office, except that it shall not be stamped with postage stamps or by means of a postage meter. Every piece of mail, when so delivered, shall bear the name of the department, board, bureau, commission, agency, or office of the state sending it and all mail received in a mailing room shall be properly stamped with postage stamps or passed through an authorized postage meter and then delivered to the United States post office. The chief of the division of service shall cause an accurate account to be kept of all pieces of mail from and the postage used on account of each department, board, bureau, commission, agency and office of the state, and the cost of such postage shall be charged by the comptroller against its appropriation for such purpose. Such central mailing rooms shall be conveniently located and shall be kept open for business as long as may be necessary to dispose of all outgoing **mail daily**. The expenditure of any state funds for postage by any department, board, bureau, commission, agency or office of the state **required** to deliver its mail to a central mailing room (other than the department of finance) shall be unlawful. * * *" (Emphasis supplied.)

Your specific attention is invited to the last two sentences above quoted, particularly to the emphasized portions thereof. The penal provision, as appears in the last sentence of the above quoted provision, in my judgment, applies only to the **mail required** to be delivered to a central mailing room. Under the next to the last sentence of the above quoted provision, the central mailing rooms are required to be kept open only so long as is necessary to dispose of all outgoing **mail daily**. I do not think this proviso means that central mailing rooms should be open twenty-four hours each day of the week. It only contemplates that they be open sufficiently long to dispose of the mail that is delivered during normal business hours, that is, mail delivered during the time that the offices of the department of the State are open for regular business. In my judgment, mail that is to be delivered to the central mailing rooms during normal business hours is all that is **required** to be so delivered.

Of necessity, situations have arisen, and will continue to arise, wherein it is mandatory that mail be posted at times other than regular business hours. The situations, as set out in your request, are notable examples of such emergencies. Likewise, numerous legal documents must be posted by certain specified times. The time that such mail must be posted in many instances will be after normal business hours or on Saturdays, Sundays, or holidays. It would be unreasonable to hold that this emergency mail is required to be delivered to central mailing rooms, which central mailing rooms will be closed at those times, with said mail probably not being delivered to the United States Post Office until the next or several days later, and so postmarked.

The premises considered, it is my judgment that in emergency situations such mail is not required to be delivered to central mailing rooms and that your department may furnish postage stamps in accordance with the procedure set out in your letter. Such procedure, if properly safeguarded, will not, in my opinion, vitiate the purpose of the central mailing room statute, which is to prevent the unnecessary expenditure of State funds for mailing purposes and to circumvent the use of State postage for personal or private use.—Cf. Quarterly Report of Attorney General, Volume 15, page 111.

I am of the opinion that the procedure set out in your second inquiry is also valid.

It will be noted that the above quoted provision is applicable only to each State department, board, bureau, commission, agency and office **located and operated in the city of Montgomery.** Of necessity, fieldmen traveling outside of the city of Montgomery do not come within the purview of the above quoted section.

The foregoing conclusions are in accord with an established administrative procedure over a period of several years. While the administrative construction of a statute is not controlling, it should be given great weight in regard to the judicial interpretation thereof.—18 Alabama Digest, Statutes, Key No. 219.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 17, 1948.

Dr. D. G. Gill,
State Health Officer,
Department of Public Health,
CAPITOL.

Health and Health Department—Rules and Regulations.

1. Under the provisions of Act No. 211, General Acts 1945, page 330, the State Board of Health has authority to make rules and regulations which shall provide standards for the construction and operation of hospitals established under this Act, and also has authority to provide for the annual licensing and license renewals for such hospitals.

2. The rules and regulations so made will have the full force and effect of law. Title 22, Section 103, Code of Alabama 1940.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of March 17, 1948, is as follows:

"Section 6 of Act No. 211, General Acts of Alabama 1945, states that the State Board of Health is authorized and empowered to establish rules and regulations which shall provide standards for the construction and operation of hospitals established under this act, and shall provide for the annual licensing and license renewal of all such hospitals so established.

"There is question in the mind of the U. S. Public Health Service as to the enforceability of these provisions, having in mind the relation of Act No. 211 to Public Law 725. Section 103, Title 22 of the 1940 Code of Alabama specifies the penalty for violation of regulations of the State Board of Health. Is this section of the law or other statutes, singly or combined, sufficient to authorize the enforcement of standards which have been or will be promulgated?"

My answer to your inquiry is in the affirmative.

From a comparison of Public Act No. 725, commonly referred to as the Hill-Burton Act and Act No. 211, General Acts 1945, page 330, it can readily be seen that the Legislature, by the adoption of Act No. 211, intended to conform to the requirements of Public Law No. 725 to the end that the State of Alabama by and through the State Board of Health could participate in any benefits made available under Public Law No. 725 by the Federal Government. In truth and in fact, Act No. 211, supra, would never have been adopted by the State Legislature if Public Law No. 725 had not been previously adopted by the Congress. The whole purpose, intent and field of operation of Act No. 211 is to allow the State of Alabama to participate in any hospital plan set up under Public Law No. 725.

Section 6 of Act No. 211, supra, reads as follows:

"The State Board of Health is hereby authorized and empowered to establish rules and regulations which shall provide standards for the construction and operation of hospitals established under this Act, and shall provide for the annual licensing and license renewals of all such hospitals so established."

Beyond question, this section of the Act grants to the State Board of Health the authority to establish and promulgate such rules and regulations as it sees fit to provide standards for construction and operation of hospitals established under the Act. As pointed out hereinabove, the establishment of hospitals contemplated by this Act were those hospitals in which the Federal Government will contribute funds under the provisions of Public Law No. 725.

It, therefore, follows that any rule and regulation required by the Federal Government having to do with the standards of construction and operation of hospitals in which the Federal Government contributes funds may be made by the State Board of Health. In other words, if certain rules and regulations are required to be made by the Federal Government so that the State Board of Health and the State of Alabama

may participate in the hospital plan contemplated by Public Law No. 725, then the State Board of Health has the power and authority to establish such rules and regulations.

Your attention is directed to Title 22, Section 103, Code of Alabama 1940, which reads as follows:

> "§ 103. Violation of regulations of state board of health.—Any person who knowingly violates or fails or refuses to obey or comply with any rule or regulation adopted and promulgated by the state board of health of this state shall be guilty of a misdemeanor and upon conviction shall be fined not less than five dollars nor more than one hundred dollars, and if the violation or failure or refusal to obey or comply with such rule or regulation is a continuing one, each day's violation or failure or refusal shall constitute a separate offense and shall be punished accordingly."

In my opinion, this section is broad enough to apply to those rules and regulations made by the State Board of Health under the provisions of Section 6, supra. This Act is now a general law of the State of Alabama and Section 103, supra, applies to any rule and regulation made under the provisions of the general laws of this State.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 17, 1948.

Hon. Coma Garrett, Jr.,
Judge of Probate,
Clarke County,
Grove Hill, Alabama.

Poll Tax—Refund.

Section 194, Constitution of Alabama 1901; Title 51, Sections 237-248, Code of Alabama 1940.

There is no provision of law authorizing a refund of poll tax voluntarily paid though such payment be inadvertent or erroneous.

Opinion by Assistant Attorney General Hardin

Dear Sir:

Your request for an official opinion, bearing date of June 15, 1948, is as follows:

"Will you please advise me as to whether there is any provision of law authorizing a refund of poll taxes inadvertently or erroneously paid in the event the taxpayer presents duplicate receipts for such payments."

It is my opinion that your inquiry must be answered in the negative.

The poll tax mentioned by you in your request for opinion is provided for and levied under the authority of Section 194, Constitution of Alabama 1901. Statutory provisions pertaining to the collection of such tax are set out in Title 51, Sections 237-248, Code of Alabama 1940. As will be observed from an inspection of the above constitutional and statutory provisions, the obligation to pay a poll tax is not an obligation that may be enforced by legal process, but is to be performed voluntarily as a test of good citizenship, leaving the question of qualification to each individual taxpayer. **Davis v. Teague,** 220 Ala. 309, 125 So. 51. The poll tax, therefore, is not such a tax as for which a lien attaches in the event of non-payment, but is merely a voluntary obligation imposed upon each person seeking to become a qualified elector of the State.

Regarding the refund of any poll tax inadvertently or erroneously paid, I wish to point out that it is a well settled general rule that, if a wrongful or illegal tax is paid by the person assessed, voluntarily and without compulsion, it cannot be recovered in an action at law or by way of set-off unless there is some constitutional or statutory provision expressly or impliedly giving him such right. 61 C. J. Taxation, page 985.

The Supreme Court of Alabama, in the case of **Town Council of Cahaba v. Burnette,** 34 Ala. 400, said as follows:

"It is a settled principle of law in this State, that money voluntarily paid, through ignorance or mistake of law, with a full knowledge of all the facts, and without fraud or imposition, cannot be recovered by action."

This rule has been changed in regard to certain taxes and licenses, Title 51, Sections 328-334, and Section 913, Code of Alabama 1940, providing for refunds in certain cases. I am aware, however, of no statute of this State which provides for a refund of poll taxes voluntarily but erroneously paid and, consequently, the rule as laid down in the case of **Town Council of Cahaba v. Burnette,** supra, applies. Report of Attorney General, Vol. 2-A, Office Edition, page 168; Report of Attorney General, Vol. 3-A, Office Edition, page 210.

I am, therefore, of the opinion that poll tax voluntarily, though inadvertently or erroneously, paid cannot be refunded. Cf. Quarterly Report of Attorney General, Vol. 15, page 337.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 17, 1948.

Honorable J. Wyatt Stuart,
Judge of Probate,
Jackson County,
Scottsboro, Alabama.

Counties—Division of Examiners of Public Accounts—Special Examination.

The expenses of a special examination by the Division of the Department of Public Accounts into the condition of a county gasoline fund is a legal charge against the county. Title 55, Section 162, Code of Alabama 1940.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of June 4, 1948, is as follows:

"By a local act of the legislature of Alabama, approved June 30, 1943, (Local Acts Ala. 1943, page 199) a Board of Revenue was created in Jackson County to become effective on the first Monday after the second Tuesday in January, 1945. By the terms of said act the Governor was directed to appoint a chairman of that body and the four incumbent commissioners were to act as members of the Board of Revenue until the expiration of their terms of office as commissioners. After the effective date of the said Board of Revenue, Governor Sparks appointed Hon. Roy D. Gist as Chairman of the Jackson County Board of Revenue. Mr. Gist qualified as chairman, made bond in the sum of $5,000.00, and acted as chairman of the Board until the act creating the Board of Revenue was declared unconstitutional by Hon. W. J. Haralson, Judge of the Ninth Judicial Circuit of Alabama.

"During the time Mr. Gist was acting as chairman of the Board of Revenue a special investigation into the condition of the Jackson County Gasoline Fund was conducted by the Department of Finance, Division of Examiners of Public Accounts. This special investigation continued over a period of several months, from approximately October, 1946 to April, 1947. At the conclusion of this special investigation, the Department of Examiners of Public Accounts submitted sworn claims amount to $5847.05 to the Board of Revenue of Jackson County for the cost of the special investigation. None of the claims, there being three separate claims submitted, one for $1438.05, one for $1898.08 and one for $2520.92, were even approved for payment by the Board of Revenue. As a matter of fact, these claims were endorsed 'disapproved' on May 9, 1947. Despite this fact, the Hon. Roy D. Gist, executed Jackson County General Fund warrants

848,832 and 861, payable to the State for the payment of the cost of such general investigation.

"An examination of the records of the Board of Revenue will disclose that the Board at no time authorized the special investigation of the Gasoline Fund.

"Your attention is called to Title 55, Section 162(1) in which it is provided that the State bear the expenses of audits and examinations of your county records.

"In view of the above, I will appreciate your opinion as to the validity of the claims submitted by the State and the legality of their payment by the then Chairman of the Board of Revenue of Jackson County."

In answer to your inquiry, you are advised that, in my opinion the claim filed by the Division of Examiners of Public Accounts for expenses in conducting a special examination into the condition of the Jackson County Gasoline Fund was a legal charge against Jackson County.

You call my attention to Title 55, Section 162(1), 1945 Cumulative Pocket Part, Code of Alabama 1940, which said section provides that the State shall bear the expenses of audits and examination of county records.

This section has as its origin Act No. 194 S-3, General Acts 1945, page 318, this section being Section 3 of said Act.

Your attention is directed to Section 6 of Act No. 194, supra, and it is to be specifically noted that Section 162 of Title 55, Code of Alabama 1940, is not repealed by this Act. All of the other sections composing Article 7 of Chapter 4, Title 55, Code of Alabama 1940, with the exception of 162 and 167 are repealed by Act No. 194.

Title 55, Section 162, Code of Alabama 1940, reads in pertinent part as follows:

"§ 162. Payment for examination.—Where the state is not interested in the examination or where the examination refers altogether to a county examination, the board of revenues or commissioners court of the county shall pay out of general funds of the county the expenses of examination, * * * * * *."

At the time this audit was made, Section 162, quoted hereinabove, was in full force and effect. It is to be specifically noted that when the State is not interested in the examination, or where the examination refers altogether to county funds, the Board of Revenue or other governing body of the county shall pay out of its general fund the expenses of such examination. Certain it is that an examination of the Jackson County Gasoline Fund is not a fund in which the State is interested. The Gasoline Fund of all the counties are exclusively county funds and

after the proceeds, which make up this fund, are turned over to the several counties by the State, then the State has no further interest in this fund.

It is, therefore, my opinion that the claim filed by the Division of Examiners of Public Accounts for the expenses of this special examination was a proper claim against the general fund of Jackson County, and was legally paid by Mr. Gist. It is further my opinion that the Board of Revenue of Jackson County was not authorized to disapprove this claim in its entirety, as Section 162, supra, definitely fixes this claim as a claim against Jackson County. On the other hand, the Board of Revenue of Jackson County did have and now has the authority to audit this claim and determine whether or not it is correct in the total amount filed by the Division of Examiners of Public Accounts. In other words, the county may now audit this claim and allow such part as they think was warranted by the examination.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 17, 1948.

Hon. D. Hardy Riddle,
Probate Judge,
Talladega County,
Talladega, Alabama.

Municipal Corporations—Permitting municipal organization to become dormant and inefficient—Disposition of monies accruing.

Title 37, Sections 16 and 21-24, Code of Alabama 1940. Title 51, Section 713, Code of Alabama 1940.

1. Mere non-use of corporate powers does not dissolve a municipal corporation and a municipal corporation permitting its organization to become dormant and inefficient is not to be deemed dissolved unless steps be taken and dissolution accomplished under the statutes providing for same.

2. In the absence of legislative or judicial action either dissolving a municipal corporation or forfeiting its charter, such corporation remains an entity and is entitled to monies accruing to it.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of May 31, 1948, is as follows:

"A petition was filed with me as Judge of Probate of Talladega County, Alabama, on the 22nd day of April, 1948, by taxpayers of the Town of Bon Air, Alabama, stating that after the town became incorporated, its corporate organization became dormant and inefficient and asking that the corporate organization be reinstated and asking that a mayor and members of the Town Council be appointed. On the 22nd day of April, 1948, I granted this petition.

"The petition was filed and granted under authority of Section 16 of Title 37 of the Code of 1940.

"The Town of Bon Air was entitled to certain funds on account of automobile licenses paid, and receipts were signed by the acting Clerk of the town as follows:

12-1-46	$ 5.46	9-20-47	.57
2-1-47	4.71	11- 1-47	105.18
4-1-47	2.49	12- 1-47	37.70
4-1-47	2.69	1- 1-48	18.86
5-1-47	3.21		

"Check was issued by me for the total amount of the above receipts ($180.87), but this check has not yet been cashed and I have held up payment of this check until I could get an opinion from you.

"Please advise me whether, in view of the fact that at some time, and at a time which probably cannot be definitely ascertained, the corporate organization became dormant, I should withhold payment of these amounts, or whether I would be justified in paying all of the above-mentioned amounts. It seems under this law that the corporation never ceased to exist, although at some time its official organization did become inefficient and dormant."

From your request for opinion, I understand that the town of Bon Air, although permitting its municipal organization to become dormant and inefficient, was never dissolved as a municipal corporation under any of the statutes provided for such dissolution. As noted in your request, any municipal corporation located within your county permitting its organization to become dormant and inefficient, may, by petition of the majority of the taxpayers thereof, request of you as Probate Judge that their corporate organization be reinstated, and that officials for such municipality be appointed by you to hold office until the next general election. Such authority is found within Title 37, Section 16, Code of Alabama 1940, and such a petition may be properly granted by you.

Sources at hand reveal that the town of Bon Air was incorporated in 1932 and that at the date of the Federal census of 1940 had a population of three hundred seventy-one persons. A municipality of such a population is subject to the provisions of Title 37, Section 21, Code of Alabama 1940, which provides as follows:

> "§ 21. Forfeiture of charter; causes for forfeiture.—If any municipal corporation having a population of eleven hundred inhabitants, or less, fail to elect a mayor or other chief executive for more than six months after the time fixed for such election; or shall fail to levy and collect city taxes for more than three successive years, or shall fail to work and keep in proper condition the main streets and roads within its limits, it shall, as a municipal corporation, forfeit its charter and such forfeitures shall be determined in the manner set out in the following sections."

Sections 22 and 23, next following, prescribe the procedure to be followed in effecting the dissolution of a municipality under the above statute. However, it is my opinion that some such action is necessary before the municipal corporation becomes dissolved under this statute.

If I properly understand your request, although the town here in question permitted its municipal organization to become dormant and inefficient, and, no doubt, became subject to the provisions of Section 21, supra, no dissolution proceedings were ever had and, therefore, the town never ceased to exist as a municipal corporation. Such being true, it is my opinion that the municipality is entitled to, and should be paid, the funds about which you inquire.

It is well settled that a municipal corporation does not ipso facto become dissolved or forfeit its charter by non-use for any period of time. **Butler et al v. Walker et al,** 98 Ala. 538, 13 So. 361. In the absence of legislative or judicial action, either dissolving such municipal corporation or forfeiting its charter, the corporation remains an entity and is entitled to such monies or other property as might accrue to it, including that money accruing to such municipality by virtue of Title 51, Section 713, Code of Alabama 1940, providing for the distribution of motor vehicle and trailer license tax funds. Biennial Report of Attorney General, 1936-1938, page 265.

It should here be noted that Section 713, supra, in prescribing for the distribution of motor vehicle and trailer license tax funds provides, in part, that seventy percent shall go to the State and thirty percent to the incorporated city or town in which the owner of the motor vehicle resides. No distinction is made between those incorporated municipalities who have permitted their municipal organization to become dormant and inefficient and those which have not, it being merely provided that the thirty percent in question shall accrue to the incorporated city or town in which the owner of the motor vehicle resides.

It is, therefore, my opinion that you are legally justified and should pay to the municipality in question the amounts accruing to it by virtue of the sale of automobile licenses to the inhabitants thereof.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 18, 1948.

Hon. Roberts H. Brown,
Attorney for the City of Auburn,
Lee County,
Auburn, Alabama.

Municipalities—Elections.

1. City Commissioners of Auburn, Alabama, elected on July 12, 1948, soon after change of form of city government, hold office until the first Monday in Ocotber, 1950.

2. Candidates for office of City Commissioners of Auburn, Alabama, at election held soon after change of form of city government, run in a field and not for designated placee.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, dated May 11, 1948, is as follows:

"At its regular meeting, held on Tuesday, May 4, 1948, the City Council of the City of Auburn, Lee County, Alabama, directed that the undersigned attorney for the City of Auburn propound to you the following inquiries for ruling:

"1. What will be the expiration date of the terms of office of city commissioners elected on 12 July 1948, under the provisions of Title 37, Chapter IV, Article 1, Section 41, Code of Alabama (1940)?

"2. When candidates file and run for the office of commissioner in an election held under the provisions of Title 37, Chapter IV, Article 1, Section 41, Code of Alabama (1940), does each candidate run for one of three stated positions, or do all candidates run in a field?"

Answering your first question, it is my opinion that the city commissioners elected July 12, 1948, will hold office until the first Monday in October, 1950. I refer you to a provision in Title 37, Section 41, Code of Alabama 1940, as follows:

" * * The terms of office of such persons so elected (as here) shall commence immediately upon their election and qualification,

and who shall hold office until the first Monday in October of the third year following, and until their successors are elected and qualified, * * *."

The official year of city commissioners, serving pursuant to Title 37, Chapter 4, Article 1, Code of Alabama 1940, begins on the first Monday in October after the election on the third Monday in September, and ends twelve months hence. Title 37, Section 41, supra. The first Monday in October, 1948, would be in the first year; the same Monday in October, 1949, would be in the second year; while the same Monday in October, 1950, would be in "the third year following." Successors to the officers elected on July 12, 1948, would begin their terms on the first Monday in October, 1950.

Reference is made to your second question. Title 37, Section 41, Code of Alabama 1940, so far as it pertains to this question, reads as follows:

"Immediately after the adoption of such form of government, which shall go into effect upon election and qualification of the commission, the probate judge of the county, with whom the petition was filed, shall forthwith call an election to be held under and to be governed by this article, the expense thereof to be paid by the municipality, for the election of three commissioners by the qualified electors of the municipality. The three persons receiving a majority of the votes cast in said election shall be elected thereto; and in the event three persons should fail to receive a majority of said votes so cast in said election, then, and in that event, those persons receiving a majority shall be elected, and another election shall be held within one week to be called and held in the same mode and manner, and under the same rules and regulations, and in the second election there shall be two candidates for each place to be filled in such second election; the person or persons receiving the highest number of votes, two for each place, shall be the only candidates in such second election; and the person or persons so receiving a majority of the votes so cast in the second election shall be elected, so that in the first and second elections only three commissioners shall be elected. If none of the candidates shall receive a majority of the votes in the first election, then only the six persons receiving the highest number of votes in the first election shall be the only candidates in the second election. If only one of the candidates shall receive a majority of the votes in the first election, he shall be elected thereto, and then only the four persons receiving the next highest number of votes, and not receiving a majority, in the first election, shall be the only candidates in the second election. If only two of the candidates shall receive a majority of the votes in the first election, then they shall be elected thereto, and the two persons receiving the next highest number of votes, and not receiving a majority, in the first election, shall be the only candidates in the second election. * * *"

Under this provision, it is my opinion that all the candidates for city commissioner run in a field. There is no provision for them to run for designated places.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 18, 1948.

Hon. C. C. Bass, Jr., Member,
The Recreation Board of the City of Andalusia,
Andalusia, Alabama.

Municipalities—Recreation Boards—Expenditures of Recreational Funds.

1. A recreation board, created by a municipality pursuant to Act No. 350, General Acts 1945, page 567, has the authority to appropriate recreational funds for the promotion of such recreational programs as will contribute to the general welfare of the residents of the municipalities.

2. A recreational program contributing to the general welfare of the residents of a municipality includes Junior Base Ball that is conducted under the auspices of the American Legion, and also includes picnics for girls of the community conducted by the American Legion Auxiliary.

3. In furtherance of a recreational program by a recreation board, expenses, including a director's salary and travelling expenses, incident or necessary to the consummation or execution of the program, may be paid out of funds appropriated to the board.

4. All expenditures must be made by or with the approval of the recreation board. The money appropriated to the board must remain in the hands of the board and be expended in furtherance of recreational program and for no other purpose.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, dated June 16, 1948, is as follows:

"The undersigned Recreation Board of the City of Andalusia, Alabama, acting through C. C. Bass, Jr., a Member thereof, duly authorized to act respectfully request of you an advisory opinion covering the following subject and points of law arising under the

Alabama Statute authorizing creation of Recreation Board, and defining the authority of such Board.

"The Board of Revenue of Covington County donated the sum of Eighteen Hundred Seventy Five ($1875.00) Dollars to our Recreation Board with the request that it be used for the furtherance of the American Legion Junior Base Ball program, as planned for Andalusia. The American Legion has requested that expenditures be made from such fund for the following items:

"1. Athletic clothing for players under the program, including jackets to be individually awarded as a token and permanent possession of first team players.

"2. Transportation expense and food for the players on out of town trips, together with lodging for the players at time of play off.

"3. Insurance premiums on liability policies for vehicles transporting players and compensation policies on players as individuals.

"4. Electric light expense for exhibition games held at night.

"5. Salary for full time Directors of the Program.

"6. Telephone expense in arrangement of games and accommodation.

"7. Food and transportation for picnics arranged as a recreation program for girls of the community, conducted by American Legion Auxiliary.

"8. Equipment for handicraft training of girls under the Auxiliary.

"The undersigned Board will gratefully appreciate your opinion as to whether the above items may be paid for from the said funds in its hands. Your opinion is also requested as to whether this Board, under the statute, may turn over the said $1875.00 to the Andalusia Post of the American Legion, or a representative designated by them, to be used as they may see fit in the furtherance of their programs, and to be accounted for at the end of the season."

My information is that the Recreation Board of the City of Andalusia, which you mentioned, was created and functions pursuant to Act No. 350, General Acts 1945, page 565; and further, that the appropriation by Covington County to the Board was made by authority of said Act No. 350, supra, as construed in an opinion of this office, dated January 14, 1948, to Mayor Travis Cosby of Opp, Alabama.

It is my opinion that the questions one through eight inclusive, should be answered in the affirmative.

Section 1 of Act No. 350, supra, authorizes the creation of a recreation board, while Section 2 thereof provides for the board's membership

and administrative officers. Section 4 of the Act provides that "The recreation board shall be responsible for the direction, supervision and promotion of such recreational programs as will contribute to the general welfare of the residents of the county or municipality." Section 6 says that the Act shall be liberally construed.

It is my opinion that the American Legion Junior Baseball Program, open competitively to all the boys of the municipality and vicinity, is a recreational program that contributes to the general welfare of the residents of the municipality. Likewise, picnics and outings for all the girls of the community, under the auspices of the American Legion Auxiliary, come within the authorized recreational program. Of course, I assume that the outings or picnics are not for selected groups, but are open to any and all who may desire to participate.

Athletic clothing, including jackets, transportation, food and lodging on out of town trips, electric light expenses for the games, telephone expenses in arrangement of games and accommodations are also necessary incidents to the consummation of the Junior Baseball Program and such expenses with other related items are allowable. The same may be said of similar expenses incident to the recreational program for the girls that you mentioned.

A salary for the director, and his traveling expenses while in the performance of his duties, is authorized by Section 3 of the Act. The mention in this section for travel expenses for the director presupposes recreational programs such as Junior Baseball, that involves traveling; hence, the provision in favor of the director.

Question three deserves special mention. If you hired vehicular transportation, the premium for liability insurance on the vehicle so hired could be included as a part of the charge for the hire of the vehicle. Such hire may be limited to an amount equal to the insurance premium and may be paid by the board.

I do not think the board would have any authority to turn over the money received by it to the American Legion Post at Andalusia or to anyone else. The responsibility for expending the money is with the board. Such expenditures may be made by or with the approval of the board. I do not mean to say that sums equal to estimated expenses to be incurred in carrying on the recreational program may not be advanced to the director. However, the director should make due accounting therefor by proper receipts that meet the approval of the board. The board may advance the money with instructions to the director for what purposes it may be spent. The director should be bound by such instructions and account for the money.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 18, 1948.

Hon. Ed. E. Reid,
Executive Director,
The Alabama League of Municipalities,
14 South Hull Street,
Montgomery, Alabama.

Municipalities—Licenses—Exemptions.

Nonprofit agricultural corporations or associations, organized pursuant to Title 2, Sections 115-133, Code of Alabama 1940, are not exempt from payment of privilege license taxes imposed by a municipality wherein they are doing business.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion dated June 10, 1948, is as follows:

"I would like to call your attention to Section 129 of Title 2 of the Code 1940 which would seem to extend to corporations organized under that title an exemption from the payment of privilege, license or permit fee to municipalities or other units of government which may customarily fix fees for the privilege of operating within their borders. I would like you to construe the meaning of that section in connection with Section 221 of the Constitution of Alabama which seems to have for its purpose preventing the State from swallowing up a field of taxation to the exclusion of municipalities or other units of government. Section 129 of Title 2 makes it very clear that corporations or associations organized under that title shall pay to the State an annual permit fee of $10.00. By the inclusion of that provision in Section 129, Title 2, I think the legislature has voided the real intent and meaning of the last part of the section, to-wit '. . . nor shall such corporation be liable for any other license or privilege fee or tax for the purpose of engaging in or transacting business, or otherwise, in this state.'

"I shall thank you to give this your earliest possible consideration and let me have your answer."

Title 2, Section 129, Code of Alabama 1940, which you mention in your inquiry, reads as follows:

"§129. Permit fee.—Any corporation or association organized hereunder shall pay to the state the annual permit fee of ten dollars now required by law, and shall pay all ad valorem taxes on its real and personal property, except that all cotton and all other agricultural products which have been raised or produced in the State of Alabama, title to which may be held by such corporation or association in its own right or for the use and benefit of its members,

and all goods and articles purchased or acquired by such corporation, whether in or out of the state, for its own use or for the use and benefit of its members for strictly agricultural or farm purposes in this state, shall, so long as held by such corporation or association, be exempt from taxation; nor shall such corporation be liable for any other license or privilege fee or tax for the purpose of engaging in or transacting business, or otherwise, in this State."

The annual permit fee of ten dollars imposed by the aforequoted section is a license tax.

Under the statutes of Alabama all occupation taxes are evidenced by a receipt which is called a "license," and the fact that an act imposing a tax on the occupation of an emigrant agent called the receipt evidencing the payment thereof a license did not render it any less a tax on the occupation for revenue. **Kendrick v. State,** 142 Ala. 43, 39 So. 203, 204.

A "license" is the evidence of permission to exercise a trade or calling in consequence of the payment of a tax or duty imposed on persons carrying on such trades or calling. **People v. Thompson,** 225 Ill. App. 567.

A "license" may be defined as a permit, granted by the sovereign generally for a consideration, to a person, firm, or corporation to pursue some occupation or to carry on some business subject to regulation under the police power. **State ex rel. Guillot v. Central Bank & Trust Co.,** 143 La. 1053, 79 So. 857, 858.

"Permit," as used in Laws 1885, c. 296, § 2, as amended by Laws 1887, c. 404, providing that town boards, village boards, and common councils, etc., may grant a permit to registered pharmacies to sell strong, spirituous, and ardent liquors, is equivalent to the word "license." The word "permit" is used merely to indicate such license to pharmacies, as distinguished from the other class of licenses mentioned. **Neuman v. State,** 76 Wis. 112, 45 N. W. 30, 32.

Little difference exists in meaning of words "license" and "permit" as used in statute authorizing licensing of dealers in malt beverages, and word "license" as used in section authorizing municipalities to levy business license taxes is a "permit" as used in section prohibiting manufacture, distribution, and sale of malt beverages in municipalities without a permit. Laws 1935, pp. 77, 80, §§ 8(1), 15A, 16. In its general sense a "license" is a permission to do something which without such permission would have been unauthorized or prohibited. **Collier v. State,** 54 G. App. 346, 187 S. E. 843, 845.

Constitution of Alabama 1901, Section 221, reads as follows:

"Sec. 221. The legislature shall not enact any law which will permit any person, firm, corporation, or association to pay a privilege, license, or other tax to the State of Alabama, and relieve

him or it from the payment of all other privilege and license taxes in the state."

Any effort on the part of the legislature to impose a license, privilege or other tax on corporations or associations and prohibit municipalities from levying a privilege or license tax on said corporations or associations would be offensive to the aforequoted section of the Constitution. **Birmingham v. O'Connell,** 13 Ala. App. 570, 68 So. 586; **Exchange Drug Company v. State Tax Commission,** 218 Ala. 115, 117 So. 673.

The courts may presume that the legislature did not intend to offend the Constitution. Therefore, statutes will be upheld in harmony with the Constitution if the natural import of the language will permit. **Montgomery Railway v. Sayre,** 72 Ala. 443, 449. Where the language is fairly susceptible to two interpretations, one of which will uphold its constitutionality and the other defeat it, it is the duty of the court to adopt the former even though it be less natural. **Quartlebaum v. State,** 79 Ala. 1, 3. It is the duty of the court, in interpreting legislative enactments, to presume there was an intention to conform to the Constitution; and to so construe any doubtful word or clause as to make it constitutional, rather than to make it unconstitutional by a contrary interpretation. **State v. Hartford Fire Insurance Co.,** 99 Ala. 221, 13 So. 362. When a statute is assailed upon constitutional grounds, it is the duty of the court to adopt, if the statute will admit of it, such a construction as will bring it within the constitutional power of the legislature. **Noble v. Mitchell,** 100 Ala. 519, 14 So. 581.

Therefore, if the aforequoted provisions of Title 2, Section 129, supra, are to be upheld with respect to Section 221 of the Constitution, then they must be held to apply only to State licenses or taxes and not to licenses or taxes imposed by a municipality.

I accord the prohibition mentioned in said code section a constitutional setting, and hold that it does not prohibit the municipality from imposing privilege or license taxes on corporations or associations organized pursuant to Title 2, Sections 115-133, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 21, 1948.

Hon. J. C. Pattillo,
Clerk Circuit Court,
Ex-Officio Clerk,
Inferior Law Court of Chilton County,
Clanton, Alabama.

Chilton County—Inferior Courts—Clerks of Inferior Courts—Costs and Fees.

1. Local Act (Act No. 452, Local Acts 1943, page 221), providing Inferior Court Clerk fees to be "the same fees, commissions and emoluments of office in cases wherein amount involved is more than $50.00 as are now or may hereafter be allowed Circuit Court Clerks," does not include ex officio fees of circuit clerks.

2. Although Local Act providing compensation for Inferior Court Clerk does not authorize payment of ex officio fees, duties of Inferior Court Clerk may be considered by county governing body in setting circuit clerk ex officio fees when circuit clerk and Inferior Court Clerk are by law the same person.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of June 2, 1948, is as follows:

"May I have your official opinion upon the following matter: Will it be lawful for the Board of Commissioners of Chilton County to pay me the same Ex-Officio fees in The Inferior Law Court as paid in the Circuit Court? I refer you to Local Acts of 1943, page 221, amending the Act creating the Inferior Law Court of Chilton County, Alabama."

The Local Act referred to in your inquiry provides for the establishment and operation of the Inferior Law Court of Chilton County, Alabama. For the purposes of this opinion, it is sufficient to state that the inferior court created exercises certain jurisdiction concurrently with the circuit court. The Clerk of the Circuit Court is made ex officio the Clerk of the Inferior Court.

Among other things, the Local Act provides as follows:

"Section 3. That the Clerk of the Circuit Court of Chilton County shall be ex-officio clerk of said Court and shall have the powers and discharge the duties, which will devolve upon the Clerk of the Circuit Court, and shall be subject to the same pains and penalties with regard to the duties of this office and shall be entitled to **the same fees, commissions and emoluments of office in cases wherein the amount involved is more than $50.00 as are now or may hereafter be allowed to Circuit Court Clerks** of Alabama and in cases where the amount involved is $50.00 or less the same fees as are now or may hereafter be allowed Justices of the Peace, and the same shall be collected as such fees are collected in the Circuit Court." (Emphasis supplied.)

In my opinion, the above quoted part of the Local Act does not entitle the Clerk of the Inferior Law Court of Chilton County to claim

ex officio fees as part of his compensation for performing the duties of Clerk of the Inferior Law Court for the reason that the underscored part of the above Local Act provides that the Clerk of the Inferior Law Court of Chilton County receive the same fees as does the Circuit Clerk in cases involving fifty dollars or more. In my judgment, compensation due the Inferior Law Court Clerk under this section must be derived from cases. The compensation refers to court costs provided for in Title 11, Sections 21 and 89, Code of Alabama 1940, as amended by Act No. 375, General Acts 1947, page 264. The phrase underlined, as appearing in the Local Act, does not, in my judgment, refer to ex officio fees provided for in Title 11, Section 24, Code of Alabama 1940, as amended by Act No. 224, General Acts 1943, page 188, and Title 11, Section 26, Code of Alabama 1940.

You are advised, however, that there is nothing to prevent the Court of County Commissioners from considering the duties that you perform as Clerk of the Inferior Law Court of Chilton County when that body establishes your ex officio fees as Circuit Clerk. See Title 11, Section 24, Code of Alabama 1940, as amended, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 21, 1948.

Hon. Thos. W. Jones,
Judge of Probate,
Madison County,
Huntsville, Alabama.

Elections—Candidates—Corrupt Practice Act.

Title 17, Sections 279-80, and Section 393, Code of Alabama 1940.

Sections 279-80, Code of Alabama 1940, part of the Corrupt Practice Act, are in no way modified or repealed by the Primary Election Law (Title 17, Sections 336-412, Code of Alabama 1940, as amended) and are applicable to second primary elections held pursuant to such Primary Election Law.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of May 28, 1948, is as follows:

"Title 17, Sections 279-280.

"One of the candidates for Member of Board of County Commissioners in the Run-Off election to be held on June 1st, 1948

failed within five days prior to such election, to file an account of his expenditures, as required by Title 17, Section 279, Code 1940.

"Section 280 of this title provides that in such failure to file this statement, the name of the candidate shall not be placed on the ballot.

"Do the provisions of these two sections apply in the Run-Off election to be held on June 1st, 1948?"

In your request, you simply inquire as to whether the provisions of the two statutes cited by you therein, which are part of the Corrupt Practice Act, have application to second primary elections held pursuant to the provisions of the Primary Election Law, as set out in Title 17, Sections 336-412, Code of Alabama 1940, as amended.

In my opinion, your inquiry must be answered in the affirmative.

Title 17, Section 270, Code of Alabama 1940, also a part of the Corrupt Practice Act, in defining the meaning of the term "election," as used therein, states that:

"The word election in this article means any election in which there is submitted to the popular vote the names of any persons for nomination or election to any office, or in which there is submitted to the popular or party vote any measure or proposition."

In addition to Sections 279 and 280, supra, relative to the filing by candidates or their committees, of accounts of their expenditures, it is provided by Title 17, Section 393, Code of Alabama 1940, with reference to primary elections that:

"From the time the first primary is held until the polls close on the day of the second primary, as herein provided, no candidate and no committee of any candidates authorized by section 274 of this title, shall expend any money or anything of value for any purpose tending in any way, directly or indirectly, to promote or aid in securing his nomination and election, except in defraying his personal traveling expenses, his own personal hotel, telephone, telegraph and restaurant bills, and the costs of giving publicity to his candidacy in newspaper, over radio, by correspondence, or by printing and publication of posters, lithographs, banners, notices and literary material, reading matter, cards and pamphlets tending to advertise such candidacy, not otherwise forbidden by law. The violation of any of the provisions of said chapter shall be a corrupt practice and a misdemeanor. **This provision shall not increase the limits of expenditures now or hereafter provided by law.**" (Emphasis supplied.)

This office, in an opinion to Honorable W. E. Butler, Judge of Probate, Madison County, Huntsville, Alabama, under date of March 30,

1936, Quarterly Report of Attorney General, Vol. 2, page 346, and again in an opinion rendered to the Honorable John S. Golson, Judge of Probate, Butler County, Greenville, Alabama, under date of May 4, 1940, Quarterly Report of Attorney General, Vol. 19, page 123, held that the provisions of the Corrupt Practice Act were not in any way modified or repealed by the 1931 Primary Election Act (Act No. 56, General Acts 1931, page 73), but that the same were applicable to all primary elections held in accordance with provisions of said act.

Pre-election expense accounts of candidates in primary elections held in accordance with the provisions of Act No. 56, supra, required to be filed by Section 279, supra, must be filed on or before midnight Thursday preceding the election, as all regular primary elections are held on Tuesday. Biennial Report of Attorney General, 1932-34, page 267.

The premises considered, it is my opinion that your inquiry must be answered in the affirmative, that is, that the provisions of the Corrupt Practice Act, referred to by you in your inquiry, are applicable to second primary elections held in accordance with the Primary Election Law.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 21, 1948.

Hon. John E. Mandeville,
Clerk Circuit Court,
Mobile County,
Mobile, Alabama.

Costs and Fees—Solicitors—Firearms—Words and Phrases, "Felonies and Misdemeanors," "Imprisonment in the Penitentiary," "Imprisonment in the County Jail"—

1. An offense punishable by "imprisonment" means imprisonment in the county jail, a misdemeanor.

2. A penal statute creating an offense and providing a punishment of mere "imprisonment" creates a misdemeanor and not a felony since the term "imprisonment" given a strict construction in favor of the offender cannot mean imprisonment in the penitentiary, which would include hard labor.

3. The solicitor's fee in cases of conviction for misdemeanors, not otherwise provided for, is ten dollars.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of June 14, 1948, is as follows:

> "I shall appreciate it if you would furnish this office with an opinion on the following matter:
>
> "The last session of the Legislature passed an act in reference to Violating Pistol Law (General Acts of 1947, Page 436) and the punishment thereunder sets out a penitentiary sentence, a hard labor sentence, a jail sentence, or a fine. What would be the proper solicitor's fee to charge under this Act?"

The act to which you refer is an act amending certain sections of the 1940 Code relating to the possession and use of pistols, Act No. 616, General Acts 1947, page 463, approved October 9, 1947.

After creating certain offenses, Section 8 of the 1947 Act provides as follows:

> "Section 8. Section 186 of Title 14 of the 1940 Code is amended to read: '(Penalties) a) EVERY VIOLATION OF SUBSECTION (A) OF SECTION 174 or of SECTIONS 183 OR 184 OF THIS TITLE SHALL BE PUNISHABLE BY IMPRISONMENT FOR NOT MORE THAN FIVE YEARS. EVERY VIOLATION OF SUBSECTION (b) OF SECTION 174 OR OF SECTIONS 175, 176, 179, 180, 181 OR 182 of THIS TITLE SHALL BE PUNISHABLE BY IMPRISONMENT FOR ANY TERM LESS THAN ONE YEAR, OR A FINE OF NOT MORE THAN FIVE HUNDRED DOLLARS, OR BOTH. THE PUNISHMENT FOR VIOLATING SECTIONS 180 OR 181 OF THIS TITLE MAY INCLUDE REVOCATION OF LICENSE.'"

In substance, therefore, the 1947 Act prescribes certain punishments for the violation of certain provisions of the 1947 Act. Violations of Subsection (A) of Section 174 or of Sections 183 or 184 are said to be "punishable by **imprisonment for not more than five years.**" Whereas, violations of Subsection (b) of Section 174 or Sections 175, 176, 179, 180, 181 or 182 are "punishable by **imprisonment for any term less than one year, or a fine of not more than five hundred dollars, or both.**"

For the purpose of deciding the proper solicitor's fee to be charged, it is necessary to determine whether or not each of these punishments prescribed in Section 8, supra, makes the offense a felony or misdemeanor. If the convictions under Section 8, supra, are for felonies, then the solicitor's fee should be taxed in the amount of thirty dollars, as prescribed by Title 11, Section 85, Code of Alabama 1940. But, if the convictions are for misdemeanors, then the solicitor's fee should be in the amount of ten dollars, as prescribed by Title 11, Section 85, Code of Alabama 1940.

I have concluded that both penalties in Section 8, supra, make the violation or the offense a misdemeanor rather than a felony. By Alabama law, a felony is defined by Title 1, Section 7, Code of Alabama 1940 as "a public offense which may be punished by death, or by imprisonment in the penitentiary; all other public offenses are called misdemeanors." In other words, if an offender **may be imprisoned in the penitentiary,** then he has committed a felony, whereas if he may not be imprisoned in the penitentiary by the terms of the penal statute, then he has committed a mere misdemeanor. Section 8, supra, uses the term "imprisonment." This section does not prescribe the place of imprisonment, but prescribes mere imprisonment. In construing a penal statute, and obviously Section 8, supra, is a penal statute, such statute must be given a strict construction in favor of persons sought to be subjected to their operation. **Anderson v. City of Birmingham,** 205 Ala. 604, 88 So. 900.

The Court of Appeals of Alabama has said that imprisonment has a meaning which is distinct from hard labor for the county. See **Thompson v. State,** 19 Ala. App. 328, 330, 97 So. 258. Imprisonment means confinement, while hard labor for the county includes additional punishment.

By our law, Title 15, Section 325, Code of Alabama 1940, the term "imprisonment in the penitentiary" includes hard labor for the State. By giving Section 8, supra, of the 1947 Act a strict construction in favor of offenders, I cannot read into the term "imprisonment" a legislative intent to subject offenders to hard labor. You are advised, therefore, that the term "imprisonment," as used in Section 8, supra, means imprisonment and mere imprisonment in the county jail. It results, therefore, that since we cannot interpret the term "imprisonment," as used in Section 8, supra, as imprisonment in the penitentiary, because imprisonment in the penitentiary includes hard labor, that the punishment prescribed makes the offense a misdemeanor. The proper solicitor's fee is, therefore, ten dollars. Title 11, Section 85, Code of Alabama 1940.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 21, 1948.

Hon. H. W. Clayton,
Judge of Probate,
Marshall County,
Guntersville, Alabama.

Licenses.

Under Title 51, Section 499, Code of Alabama 1940, as amended by Act No. 136, General Acts 1947, page 44, manufactured goods on hand should not be considered in computing the amount of

the license, as said goods do not come within the terms "plant," "equipment," "supplies," or "fixtures."

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of June 7, 1948, is as follows:

"Section 499 of Title 51, Article 1, Chapter 20, Code of Alabama of 1940, as amended by Acts of the Legislature approved July 18th, 1947 (1947 Acts, pages 44-45) sets the amount of license fees for persons engaged in any manufacturing mill or plant where any finished or semi-finished product of grain, oats, corn, rye, etc., (with other matters therein enumerated) on a sliding scale at from $10.00 to $100.00 depending upon the bracket fixed by this Act which is to be paid to the State as privilege license for engaging in such business.

"Suppose that such manufacturing company has invested a sum of money in its plant, equipment, supplies and fixtures of less than $100,000.00 but that it has on hand investments of manufactured products which added to the fixtures, etc., would make it in excess of $100,000.00. In issuing such license should the fee charged be for the $100,000.00 or should it be for the bracket fixed. Here the total for plant, equipment, supplies and fixtures is over $50,000.00 and less than $100,000.00. I have a situation which I think will fall within this statement of facts. Please advise me which of the two fees should be charged."

In my opinion, the company in question should pay a fifty dollars license since from your facts, the investment for the plant, equipment, supplies and fixtures is more than fifty thousand dollars and less than one hundred thousand dollars. The manufactured goods should not be considered in computing the amount of the license as they do not come within the terms "plant," "equipment," "supplies," or "fixtures." Title 51, Section 499, Code of Alabama 1940, as amended by Act No. 136, General Acts 1947, page 44, provides, in pertinent part, as follows:

"* * * fifty dollars where the investment for plant, equipment, supplies and fixtures is fifty thousand dollars and less than one hundred thousand dollars; * * *."

The manufactured goods are not a part of the capital employed in the plant as they are finished products. See opinion of this office to Hon. H. C. Dowling, under date of February 29, 1944, Quarterly Report of Attorney General, Vol. 34, page 41, which holds that the only measure for determining the amount of license imposed by Title 51, Sec. 499, Code of Alabama 1940, is the amount shown by the books to be invested

in tangible fixed assets or capital, whether represented by land, buildings, machinery, or equipment, or all of them, or some of them, used in carrying on the business, plus the amount invested in supplies at the time application for license is made.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 25, 1948.

Honorable Clarence V. Evans, Chairman,
Board of Equalization,
Mobile County,
Mobile, Alabama.

Mobile County—Merit System—Board of Equalization.

A person appointed under the provisions of Act No. 470, Local Acts 1939, page 298 (Mobile County Civil Service Act), does not forfeit his position of employment under the terms of Section XXVII(d) of said Act because a person related within the fourth degree by blood or marriage to such employee, subsequent to the original appointment of such employee, becomes a member of the board or body which is the appointing authority.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of June 15, 1948, is as follows:

"A request is hereby made for an official opinion as to the eligibility of Thomas J. Geary to serve as an Appraiser under the Board of Equalization of Mobile County. The facts in the case are these:

"On June 5, 1946, under authority of a certification by the Director of the Mobile County Personnel Board, an offer of employment was made to Mr. Geary by Mr. E. B. Peebles, Chairman of the Board of Equalization, as follows:

" 'Mr. Thomas J. Geary
66 St. Francis Street
Mobile, Alabama

" 'Dear Tom:

" 'At a meeting of the Board of Equalization, held June 3, 1946, you were selected as one of three Real Estate Appraisers to under-

take this type of work, (beginning June 15, 1946) for this Board. Your name was selected from a list certified to us by the Personnel Board.

" 'It is agreed between you and ourselves that your salary will be on the basis of $7500.00 per year, for a two year period, and that you will devote a minimum of 40 hours per week to this job. The Board is willing that you work said hours at any time convenient to you during the week. It is mutually agreed between us, also, that you can resign from this position, or this Board can request your resignation, upon a 30 day written notice.

" 'Your work is to be under the direct supervision of this Board, and all instructions will be transmitted to you through Mr. Harry Touart, Secretary of the Board.

" 'If we understand each other, and you desire to accept this appointment, please sign the enclosed copy of this letter, and return to me for our files.

" 'Sincerely yours,

" 'E. B. Peebles, Chairman
Board of Equalization
Mobile County.'

"On June 7, 1946, Mr. Geary signed the copy of the letter, in accordance with the original letter, above, and submitted it to the Board of Equalization.

"During the latter part of 1947, a new Board of Equalization was appointed according to law, the new chairman of said Board being Mr. Clarence Evans, who happens to be a brother-in-law of the said Mr. Geary. Now the question has arisen as to whether Mr. Geary's continued employment as an appraiser under the aforesaid Board of Equalization violates any of the provisions of the laws or rules of the Mobile County Civil Service. This question seems to involve two parts, as follows:

"1. Was Mr. Peebles' offer of employment to Mr. Geary as contained in Mr. Peebles letter of June 5, 1946, for a specific period of two years, which would necessitate Mr. Geary's reappointment on the 16th of June, 1948, and which latter appointment would be contrary to the Civil Service Rules and Regulations?

"Mr. Peebles' letter seems to be ambiguous on this point, but I have talked to Mr. Peebles and to the other members of the former board and they are of unanimous opinion that it was their intent to appoint Mr. Geary for the duration of the appraisal in Mobile County. I am attaching hereto an affidavit from Mr. Peebles

and the other members of the former Board, further elaborating on this appointment. In addition I am quoting from the minutes of the Board of Equalization of March 10, 1947, which concern primarily another matter but which touched on the point in question.

"'On property appraised by the three appraisers, Mr. T. J. Geary, Mr. T. M. Moore and Mr. W. W. Boyles, who were employed by the Board of Equalization for the purpose of appraising all property in Mobile County, in order that the assessments might be equalized, that the property appraised in the district to the close of the assessing period of January 19, 1947, and the values set opposite the property by the Board of Equalization on the property appraised in this district, shall be the value for the tax year 1947, and the Tax Assessor, as Secretary of said Board, is hereby instructed to notify the Tax Payers of any change made in the assessed value of the property so valued in the column shown on the assessment as the Equalization Board's value.'

"You will notice that in these minutes mention is made that Mr. T. J. Geary, Mr. T. M. Moore and Mr. W. W. Boyles 'were employed by the Board of Equalization for the purpose of appraising all the property in Mobile County.' For your information, at the present time only a small part of the property in Mobile County has been appraised.

"It is further questioned whether the Board of Equalization or the Personnel Board under the law as now construed would have the power to establish a tenure covering any employment.

"2. The question has been raised as to whether Mr. Geary could legally serve as an appraiser under the present Board of Equalization even though he were appointed to complete the job of appraising all the property in Mobile County, due to the provisions of Section 27 of the Mobile County Civil Service Law, and the fact that Mr. Evans, Chairman of said Board, is a brother-in-law of Mr. Geary. However, in regard to this point, it would seem contrary to all the principles of Civil Service that a career man, properly qualified and appointed under the Civil Service Rules and Regulations, could lose his Civil Service status simply because at some time subsequent to his employment, his appointing authority, or a member of a board constituting his appointing authority, should happen to be a kinsman."

In reply to your request, you are advised that, in my opinion, Mr. Thomas J. Geary has not forfeited his position as Real Estate Appraiser for the Board of Equalization of Mobile County, due to the fact that you are Mr. Geary's brother-in-law, and also Chairman of the Board of Equalization. This conclusion is based on a construction of Act No. 470, Local Acts 1939, Page 298, approved September 15, 1939, and particularly Section XXVII(d) thereof, and other surrounding circumstances, including Act No. 476, Local Acts 1939, Page 321, approved on the same date.

Section XXVII(d) of Act No. 470, supra, is as follows:

"(d) Anything in this Act which might be construed to the contrary notwithstanding, no person whether employed at the time of the passage of this Act in the Classified Service as defined in this Act, or who applies for appointment to any position in the Classified Service after the passage of this Act, shall be allowed to fill any position within the Classified Service, or allowed to continue to hold such position, if said person is related by blood or marriage within the fourth degree to the Public Officer who is or would be his or her superior, or so related to any member of any Board or Body, constituting the appointing authority over such position, and the Personnel Board and Personnel Director shall administer this act accordingly. The Commission of any such corrupt practice shall be a misdemeanor punishable as such in said County."

In arriving at the true import and meaning of the above quoted section of Act No. 470, Act No. 476, supra, must be considered in connection therewith. Section 1 of this Act is as follows:

"The Personnel Board created or to be created under any law providing for any County-wide Civil Service System in Mobile County, Alabama, is hereby vested with authority to allow any person who, at the time of the passage of this Act, is employed in any employment to which any such Civil Service System is applicable, to hold any such position, notwithstanding that such person is related by blood or marriage, within any degree, to any public officer who is his or her superior, or so related to any member of any Board or Body, having the power of appointment over such position."

It is quite true that Section XXVII(d), supra, provides that no person whether employed at the time of the passage of the act or who applies for appointment to any position after passage of the act shall be allowed to fill or continue to hold such position if said person is related by blood or marriage within the fourth degree to the public officer, or to any member of any board or body, constituting the appointing authority over such position.

There are in Mobile County a great number of boards or bodies that constitute appointing authorities, the membership of which changes from time to time. Examples of such boards or bodies are the Board of Revenue and Road Commissioners of Mobile County, the Board of City Commissioners for the City of Mobile, the Governing Body of the City of Pritchard, and the Board of Equalization of Mobile County.

I cannot believe that it was the legislative intent that each change of membership in any of these boards or bodies would jeopardize or terminate the tenure of employment of any employee of Mobile County within the classified service of the Civil Service Act of said county who happened to be related by blood or marriage within the fourth degree to

any person who might become a member of the board or body constituting the appointing authority after the original appointment of such person. To my mind, Section 1 of Act No. 476, supra, conclusively shows that this was not the intention of the legislature by the adoption of Section XXVII(d) of Act No. 470, supra. The legislature no doubt realized that by the adoption of Section XXVII(d), supra, it had imposed a too stringent yardstick by which to measure the employment of persons by the various boards and bodies of Mobile County. Act No. 476, supra, which was approved on the same day as Act No. 470, supra, tends to take away the harshness of the rule laid down in Section XXVII(d). This latter act provides in no uncertain terms that the personnel board was vested with authority to allow any person employed at the time of the passage of Act No. 470, supra, to continue to hold such position in the classified service notwithstanding relation to the appointing authority within the degree prohibited by Section XXVII(d). Thus, it seems to me that Act No. 476, supra, has removed the harshness of Section XXVII(d), supra, and the only field of operation of Section XXVII(d) now is to prohibit the original employment of persons related to the appointing authority or members thereof within the prohibited degree therein set out.

The conclusion hereinabove reached is strengthened by excerpts from the minutes of the Personnel Board of Mobile County. The following is quoted from the minutes of a meeting held on October 15, 1945:

> "The Director thereupon recommended the classification, subject to receipt of official notice of the number of clerks by the State Commissioner of Revenue, of one Chief Clerk, one Stenographer, and nine Senior Clerks for the office of the Board of Equalization of Mobile County, these positions to continue for such time as is necessary (estimated as two years) to complete the tax equalization program. On motion unanimously carried, the recommendation was approved and it was so ordered."

The foregoing excerpt is quoted for the purpose of showing that any reference to tenure of employment of personnel of the Board of Equalization was based entirely upon (a) the money then available and (b) the length of time estimated by the Board of Equalization to adequately finish the equalization program in Mobile County. It was never intended that this action of the Personnel Board be construed as definitely fixing the tenure of employment of those employees. In truth and in fact, I find no authority in Act No. 470, supra, which gives or attempts to give the Personnel Board the right to fix the tenure of employment of any employee within the classified service of Mobile County.

Of particular interest and importance is the following excerpt from the minutes of the Personnel Board at a meeting held on December 17, 1945:

"The Board also, on motion unanimously carried, adopted the specifications for the Real Estate Appraiser classification as originally proposed subject to the changes suggested at this meeting, and classified the three appraiser positions recently created by the Board of Equalization with the understanding that these positions are full-time positions to continue for not to exceed three years."

From a consideration of information furnished by the attorney for the Personnel Board and the former Chairman of the Board of Equalization, it appears quite definite that the Board did not intend to limit the tenure of employment of any employee of the Board of Equalization to two years, but merely gave recognition to the fact that, at that time, the proposed program of the Board of Equalization and the available funds indicated that the employment of these persons, Mr. Geary being one of them, might possibly be terminated within a two year period. There is quite a difference in terminating the employment of a person and attempting to fix his tenure of employment.

In conclusion, I would like to point out that, looking at this question in its worst light insofar as Mr. Geary is concerned, it is to be noted that the inhibition contained in Section XXVII(d), supra, is against the appointment of a person by the appointing authority when such person is related within the prohibited degree to such appointing authority or a member thereof. Even though the original appointment of Mr. Geary might be considered to have been made for a definite term of years, the extension of that term for an additional period would not constitute a new appointment, but would merely be a continuation of a position and employment already in existence, and would, therefore, not fall within the prohibition of any of the provisions of Act No. 470, supra.

It is, therefore, my opinion that Mr. Geary, in the light of all of the circumstances, may continue as Real Estate Appraiser of the Board of Equalization of Mobile County, and neither you nor anyone else would be charged with violating any of the provisions of this Civil Service Act.

Any other conclusion would be contrary to the basic concept of all civil service or merit system laws, the paramount purpose of which is to afford a measure of security to employees within the purview of such laws who have met the qualifications and standards established thereby.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 25, 1948.

Hon. Tom B. Ward,
County Attorney,
Tuscaloosa County,
Tuscaloosa, Alabama.

Taxation—Exemptions—Factories.

Packing plant is not qualified for the tax exemption provided for by Title 51, Section 3, Code of Alabama 1940.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of October 6, 1947, is as follows:

"In Re: Petition of G. E. Morgan and Julia S. Morgan, doing business as Morgan Packing Company, for exemption from the payment of taxes.

"The above people during September, 1947, made application for exemption from taxes for county purposes, except for county schools and school district purposes, in accordance with the provisions of Section 3, Title 51 of the 1940 Code of Alabama on the buildings, machinery and works of the above concern and people.

"Formerly Mr. G. E. Morgan was engaged in the packing business and sold out his business to Ziegler's several years ago. Ziegler's is also operating a packing plant in the County of Tuscaloosa, Alabama.

"Morgan Packing Company was organized for the purpose of processing and preparing for human consumption meat and meat products.

"As we understand this is a new concern that erected its plant in Northport during the year 1947 for the purpose of processing meat and meat products.

"We do not find in Section 3, Title 51 of the 1940 Code of Alabama packing companies as being listed as some of the factories or manufacturing concerns that could be exempted in the discretion of the Board of Revenue of this County from the payment of county taxes. This Section 3 does provide for the exemption from County taxes in addition to the factories listed or mentioned in Section 3 'factories engaged in manufacturing other products.'

"The Board of Revenue would like to know whether or not these people, doing business as Morgan Packing Company, can be

exempted from County taxes as provided in said Section 3, Title 51, of the 1940 Code.

"We will appreciate a reply to this letter at your first convenience."

I am of the opinion that a packing plant is not qualified for the tax exemption as provided for by Title 51, Section 3, Code of Alabama 1940.

Title 51, Section 3, supra, lists specific classes of factories and plants which are qualified for certain exemptions from the payment of ad valorem taxes. Packing plants as such are not listed within any of the enumerated classes of exempted factories or plants. Since the courts have many times held that exemptions are strictly construed against the taxpayer, it is my conclusion that a packing plant is not subject to the exemption, as there is no mention in Title 51, Section 3, supra, of packing houses or any similar industry.

In deciding this question, I am not unmindful of the contention that is often made that the expression "or any other manufactured products" as used in Section 3, extends the exemption to classes of factories other than those specifically designated.

Quoted for your information is the following excerpt from Title 51, Section 3, supra:

"§3. **Exemption of certain factories, industries and plants.**—For the purpose of encouraging the building, extending, and operation of factories for the spinning of thread and yarns, * * * and factories for the manufacture of bags, wood pulp products, glass factories, ceramic factories, enameling factories and silica processing industries, paper, paper bags and other pulp products, wooden cabinets, and farm implements or mining of gold and graphite, **or any other manufactured products,** * * * * * the court of county commissioners, or other court or board having like jurisdiction of any county, * * * * are authorized and empowered to remit the taxes assessed for all county and municipal purposes, * * * * * *." (Emphasis added.)

The doctrine of "ejusdem generis" requires that where particular classes of things are followed by general words, the general words are presumed to describe the particular classes previously enumerated. If the legislature had intended the general expression "or any other manufactured products" to include products of the classes not enumerated previously, it would have been unnecessary and uncalled for to have enumerated the various particular types of factories that are set forth. **Central of Georgia v. State,** 40 So. 991, 145 Ala. 99; **Johnson v. State,** 32 Ala. 583; **Prim v. State,** 36 Ala. 244. Therefore, the expression "or any other manufactured products" means any other manufactured products of the kinds and nature previously enumerated in Section 3.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 25, 1948.

Hon. L. R. Grimes,
Board of Revenue,
Montgomery County,
Montgomery, Alabama.

Montgomery County—Attorneys.

The Board of Revenue of Montgomery County is authorized to retain and employ an attorney under Act No. 166, Local Acts 1911, page 193, or to retain and employ an attorney or attorneys when it is deemed advisable or necessary, under Title 13, Section 229, Subsection 8, Code of Alabama 1940.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of June 14, 1948, is as follows:

"In recent years, the duties of the County Attorney have greatly increased and nowadays, the County Attorney is constantly being called on and the Board of Revenue feels that the compensation for the County Attorney, set by the Act of 1911, is not adequate. General Acts of 1911, Page 193)

"For the convenience of the person who will write the opinion, we are quoting pertinent sections of the Code and decisions of the Supreme Court of Alabama that may be helpful:

"Title 13, Section 229, Sub-section 8, Code of 1940

"Stone vs. State, 220 Ala 437

"State vs. Stone, 235 Ala 233

"In view of the circumstances above outlined and in fairness to the County Attorney, we would appreciate it if your office would advise us if we may raise the compensation of the County Attorney of Montgomery, Alabama, in an amount deemed reasonable by the Board of Revenue."

An answer to your inquiry necessitates a consideration of Act No. 166, Local Acts 1911, page 193, and Title 13, Section 229, Subsection 8, Code of Alabama 1940.

Act No. 166, supra, **authorizes,** but does not **require,** the Board of Revenue of Montgomery County to retain and employ an attorney. If such an attorney is retained and employed under the authority of said act, he must be employed for a term of four years from the first day

of March, 1911, and each four years thereafter and until his successor is retained and employed; he is removable at any time for cause by a two-thirds vote of the members of said board; it is his duty to advise said board and the members thereof from time to time as said board or its members may require in regard to all matters concerning which the board may officially desire advice, and to represent Montgomery County in all matters of a civil nature in which said board shall desire his services, except those matters wherein by law the solicitor or some other official is required to act for or on behalf of the county; and said attorney shall be paid for his services at the rate of eighteen hundred dollars per annum, payable monthly out of the general fund of the county.

Section 229, Subsection 8, supra, reads, in pertinent part, as follows:

> "* * * But courts of county commissioners or boards of revenue may retain or employ attorneys when it is deemed advisable or necessary, and the agreed compensation to them may be paid as are claims to grand and petit jurors."

Under this provision, as construed by our Supreme Court, a county governing body is authorized to employ counsel, and to pay them for their services, at their discretion, when deemed advisable or necessary in the administration of county affairs. **Clark v. Eagerton**, 207 Ala. 491, 93 So. 455; **Stone v. State ex rel. Armbrecht**, 220 Ala. 437, 125 So. 653; **State ex rel. Sossaman v. Stone**, 235 Ala. 233, 178 So. 18. The employment of an attorney or attorneys under this provision of law is a matter of contract between the county governing body on the one hand and the attorney or attorneys so employed on the other hand, with the conditions of employment, including the amount, nature and kind of legal services to be rendered, the length of employment, and the compensation to be paid being matters to be agreed upon by the contracting parties. Of course, under this provision, a county governing body could not retain and employ an attorney or attorneys to represent the county in respect to county affairs where that duty is expressly delegated and imposed on some other officer. Authorities, supra.

In my opinion, Act No. 166, supra, is not repealed by Section 229, Subsection 8, supra, which had its origin in Act No. 64, General Acts 1919, page 68; nor does Act No. 166, supra, prevent Section 229, Subsection 8, supra, from having a field of operation in Montgomery County, if the Board of Revenue of Montgomery County elects to act pursuant to Section 229, Subsection 8, supra, in retaining and employing attorneys when it is deemed advisable or necessary, rather than acting under Act No. 166, supra. (I have pointed out hereinabove that Act No. 166, supra, merely **authorizes**, but does not **require**, the Board of Revenue of Montgomery County to retain and employ an attorney.)

However, if the Board of Revenue sees fit to retain and employ an attorney under authority of Act No. 166, supra, it may not also retain and employ an attorney or attorneys under the authority of Section 229, Subsection 8, supra. This for the reason that Act No. 166, supra, requires

the attorney retained and employed thereunder to advise the Board of Revenue and the members thereof on all matters concerning which the board may officially desire his advice and to represent Montgomery County in all matters of a civil nature in which said board shall desire his services, with the exception hereinabove noted.

The premises considered, I advise you that if you retain and employ an attorney under the authority of Act No. 166, supra, said attorney must be paid eighteen hundred dollars per annum and the Board of Revenue of Montgomery County has no authority to increase his compensation beyond that amount. On the other hand, if the Board of Revenue of Montgomery County elects not to retain and employ an attorney under the authority of Act No. 166, supra, but elects to retain and employ an attorney or attorneys when it is deemed advisable or necessary under the authority of Section 229, Subsection 8, supra, then the compensation of the attorney or attorneys so retained and employed is a matter of contract between the Board of Revenue on the one hand and the attorney or attorneys so retained and employed on the other.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 29, 1948.

Honorable J. M. McLeod,
Judge of Probate,
Wilcox County,
Camden, Alabama.

Judge of Probate—Infants—Funds.

1. Funds belonging to a minor paid to judge of probate under the provisions of Title 21, Section 99, Code of Alabama 1940, as amended by Act No. 363, General Acts 1943, page 337, may not be paid to a grandparent of the minor.

2. No bond is required in connection with the handling or disbursing of such funds.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of June 10, 1948, is as follows:

"Under provisions of Section 98, et seq., Title 21, Code of Alabama 1940, there has been paid into this Court the sum of to-wit: $310.00, said sum paid by an Insurance Company to a beneficiary, namely: Andrew L. Matthews, a minor, under the age of 18 years. Both

parents of this minor are dead and he is residing with his maternal grandmother and natural guardian.

"Will you kindly advise me as to whether or not the law of Alabama is broad enough to permit me to make a lump payment to this Grand Parent, with whom this minor resides, in lieu of disbursements direct to said minor; that is, provided I should, after a hearing, find said Grand Parent to be an honest and suitable person to disburse said funds for said minor.

"Also, will you advise me as to whether or not any bond is required in connection with proceedings under above cited Code Sections."

In answer to your first inquiry, you are advised that, in my opinion, you may not pay the money in your hands belonging to a minor to a grandparent of such minor.

Your attention is directed to Title 21, Section 101, Code of Alabama 1940, which reads as follows:

"§101. Duty and authority of judge.—The judge of probate shall expend such money in the maintenance and support of the minor or person of unsound mind or his wife or minor children, but should it be made to appear to said judge that it is to the interest of the minor that said money be paid to the **father or mother** of said minor and that such parent is an honest and suitable person to disburse said fund for said minor, or if such minor is over the age of eighteen years, or is a married woman and it appears to said judge that it is to the interest of said minor that such payment be made to him or her, the judge may make an order and pay the same to such parent or such minor." (Emphasis supplied.)

It is to be specifically noted that the above quoted section only provides for the payment of such monies to the father or mother of a minor when it appears to the probate judge that such payment is to the best interest of the minor.

This whole procedure is purely statutory, and, in construing statutes where the wording of the statute is plain and unambiguous, the plain import of the statute must be followed.

I must, therefore, advise you that the wording of Section 101, supra, is not broad enough to permit you to pay the monies you have on hand for this minor over to the grandparent.

In answer to your second inquiry, I do not find any provision of law whereby any bond is required in connection with receiving or disbursing monies coming into the hands of the probate judge under the

provisions of Section 99, Code of Alabama 1940, as amended by Act No. 363, General Acts 1943, page 337.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 29, 1948.

Hon. F. G. Nunnelley, Chairman,
Calhoun County Commission,
Anniston, Alabama.

Taxation—Exemptions—Factories.

Factory used for the purpose of manufacturing garments or wearing apparel is qualified for exemption provided for by Title 51, Section 3, Code of Alabama 1940.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of May 26, 1948, is as follows:

"Under the authority of Section 240, Title 55, Code of Alabama, 1940, as last amended, your opinion is requested by the Calhoun County Commission as to the question of law presented by the following facts:

"On or about November 17, 1947, R. L. Hebson, doing business as Hebson Garment Company in the City of Anniston, Alabama, filed with the Calhoun County Commission a written application for a tax exemption under Sections 3 and 4, of Title 51, Code of Alabama, 1940. This application not having been granted, on May 24, 1948, it was amended in its entirety and a true copy of such amended application is attached hereto and marked 'EXHIBIT A.'

"Assuming the correctness of the facts stated in above amended application, your opinion is desired as to the following questions of law raised by said application:

"1. Is the Calhoun County Commission authorized by law to grant the exemption from County Taxes mentioned in Sections 3 and 4, Title 51, Code of Alabama 1940 to the factory or plant and the works, machinery and equipment thereof described in said amended application?

"2. If so, from what date shall such exemption by its terms be made to start?"

I am of the opinion that your county governing body, under the authority of Title 51, Section 3, Code of Alabama 1940, may grant the exemption herein requested.

Your attention is invited to the express provisions of the above cited code section which specifically authorize the exemption of factories, plants, etc., which manufacture garments or wearing apparel. The following quoted excerpt from Exhibit A attached to your request clearly shows that the Hebson Garment Company is a factory or plant constructed for the manufacture of garments or wearing apparel:

> "That on or about January 12, 1946, he started construction of a factory or plant for the manufacture of garments or wearing apparel at 25 East G Street, Anniston, Alabama, on property which with adjoining property is more particularly described as follows:
>
> "Lots 15, 16, 17 and 18, in Block 4, South Anniston, Division 1, all in the City of Anniston, Alabama;
>
> that said construction included the construction of a cement block building approximately 50 feet by 100 feet which was to be equipped with the various machines and equipment necessary and convenient for the manufacture of garments or wearing apparel; that by approximately July 1, 1946, some machinery and equipment had been installed."

In answer to your further inquiry as to the years for which the requested exemption may be granted, I invite your attention to the following quoted excerpt from Title 51, Section 3, Code of Alabama 1940, that provides for the periods for which such exemption may be granted:

> "§3. * * * the court of county commissioners, or other court or board having like jurisdiction of any county, * * * are authorized and empowered to remit the taxes assessed for all county and municipal purposes, except for county school and school district purposes, * * * for a period not exceeding ten years from the date of incorporation or organization of such factories or plants, if incorporated and organized under the laws of the State of Alabama, or for a period not exceeding ten years from the date of being granted permission to do business in the State of Alabama, if a foreign corporation, or from the date of completion of such plant or factory, or from the date of completion of such addition or extension thereof. * * * *."

From the above quoted statutory provisions, it can thus be seen that an exemption may be granted to a domestic corporation for a period not exceeding ten years from the date of incorporation, or for a period not exceeding ten years from the date of completion of such plant or factory. In the event the Hebson Garment Company is a foreign corporation, then an exemption may be granted for a period not exceeding ten years from the date of being granted permission to do business in

the State of Alabama, or for a period not exceeding ten years from the date of completion of such plant or factory.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 29, 1948.

Hon. C. C. Horton,
State Service Commissioner,
Department of Veterans' Affairs,
Montgomery 2, Alabama.

Veterans—Exemptions—Licenses.

All veterans, disabled or otherwise, properly qualified under the law, may claim license exemptions in payment of the license fee levied upon a person engaged in business as producer of milk by Title 22, Section 215, Code of Alabama 1940.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of April 8, 1948, is as follows:

"This Department requests your official opinion on the subject of veterans' business or occupational license exemptions as pertaining specifically to License Fees established by Section 215 of Title 22, Code of Alabama, 1940. Under the sub-title 'Producers,' it is provided therein:

" 'All persons required by this chapter to be licensed shall pay a yearly license fee computed upon the following rates: . . . . Producers—An amount equal to seventy-five cents for each cow in his dairy herd or herds, dry or milking, over two years old, provided that each person, firm or corporation who owns or operates two cows or less shall be exempt from the payment of a license fee as a producer.'

"The question presented is whether or not the veterans' license exemptions may be granted on said license, as provided in Act No. 353, 1945, as amended by Act No. 698, 1947, and Sections 852 through 864 as amended by Act No. 564, 1943, and Act No. 366, 1945.

"Your opinion at your earliest convenience would be appreciated."

In your request, you inquire as to the exemption of all veterans, both disabled and otherwise, from payment of the license fee prescribed by the

pertinent portion of Title 22, Section 215, Code of Alabama 1940, set out in your inquiry.

In my opinion, your inquiry as to both classes of veterans must be answered in the affirmative, provided such veterans meet all other of the requirements prescribed by the statutes pertinent thereto.

Considering all veterans, irrespective of disability, it is provided by Act No. 353, General Acts 1945, page 570, later amended by Act No. 698, General Acts 1947, page 535, that:

> " 'Section 1. Every bona fide permanent resident of the State of Alabama who has served 90 days or more in the armed forces of the United States between September 16, 1940, and the termination of World War II by the signing of a definitive (sic) treaty of peace shall, upon sufficient identification, and upon sufficient proof of being a permanent resident of this State, and upon the production of an honorable discharge from or other proof of the honorable termination of such service, be exempt from business or occupational license taxes for a period of six years after the effective date of this Act or for a period of six years after his or her discharge from or termination of service, whichever is later, to the extent and subject to the conditions herein specified.' No exemption however, shall be allowed any such person from the license tax on what commonly are known as rolling stores; nor shall the exemption herein granted be construed as relieving any person from the payment of any license tax for the registration or operation of any motor vehicle."

It is further provided within Act No. 353, supra, that such veterans who shall engage in or carry on any businesses or occupations for which license taxes are prescribed by the State of Alabama, or any county or municipality thereof, shall be entitled to such licenses to engage in or carry on those businesses or occupations upon the payment of the license taxes prescribed less, as regards each veteran, such portion of the license taxes as shall not exceed thirty-five dollars ($35.00). As noted, such exemption is equally applicable to state, county or municipal license taxes, and exemption may be claimed from each, it being provided, however, that no such veteran may claim the exemption in more than one county, or in more than one municipality. It is further provided within Act No. 698, supra, that any veteran whose property, both real and personal, is valued at seven thousand dollars ($7,000) or more, or whose net annual income is three thousand dollars ($3,000) or more, shall not be granted the exemption provided above but shall be granted an exemption of fifteen dollars ($15.00) on his license from each the city, county, and state.

With reference to the license tax here considered, it is provided by Title 22, Section 213, Code of Alabama 1940, that a person engaged in business as a producer of milk must obtain a license to do so, application for such license to be made to the Milk Control Board as established by Title 22, Section 207, Code of Alabama 1940. The license fees prescribed

are found set out within Title 22, Section 215, supra, and are as stated in your request. Title 22, Section 221, provides for the disposition of such license fees, prescribing that such monies be paid by the Milk Control Board into the treasury to the credit of the Milk Control Board Fund. It would, therefore, appear that such fee is a license fee levied by the State of Alabama upon the privilege of engaging in business as a milk producer, as defined by the above statutes.

I know of no valid reason why those exemptions afforded veterans under the provisions of Act Nos. 353 and 698, supra, would not be applicable to this particular license fee, and it is my judgment and opinion that those veterans, otherwise qualified, are entitled to such exemptions.

With reference to disabled veterans, it is provided by Title 51, Section 852, Code of Alabama 1940, as amended by Act No. 564, General Acts 1943, page 562, that:

> "Every bona fide permanent resident of the State of Alabama who served as an enlisted man in the United States army, navy or Marine Corps during the World War between April 6, 1917, and November 11, 1918, or in the Spanish American War between April 21, 1896 and July 4, 1902, or who served as an officer or enlisted man in the army or navy of the Southern Confederacy during the Civil War, or any soldier, sailor or other person serving in the armed forces of the United States between December 7, 1941 and the termination of the existing War by the signing of a definitive (sic) treaty of peace, and who, at the time of his application for license, as hereinafter provided for, shall be physically disabled to the extent of twenty-five per cent, or more, shall, upon sufficient identification and upon sufficient proof of such disability and upon sufficient proof of being a permanent resident of this state, and upon the production of an honorable discharge or other proof of the termination of honorable service from the United States Army, Navy or Marine Corps during the World War, or Spanish American War, or the armed services of the United States, within the respective limits hereinabove prescribed, or from the service of the Southern Confederacy during the Civil War, be exempt from business or occupational license taxes to the extent, and subject to the conditions hereinafter specified. Provided that no exemption, deduction or commutation shall be allowed any person from the license or tax on what is commonly known as rolling stores; nor shall said exemption, deduction or commutation be construed as relieving any person from the payment of any license tax for the registration or operation of any motor vehicle upon the public highways of this State."

It is further provided by Title 51, Section 853, Code of Alabama 1940, as amended by Act No. 366, General Acts 1945, page 589, with reference to State licenses, that:

> "Each such veteran who shall engage in, or carry on, any businesses or occupations as a means of livelihood through the per-

sonal efforts of such person or through the personal efforts of such persons and not more than one employee, helper, or apprentice, for which businesses or occupations license taxes are prescribed by the State of Alabama, shall be entitled to licenses from the State to so engage in, or carry on, such businesses or occupations upon payment of the license taxes so prescribed, less all, or such portion of, such license taxes as shall not exceed twenty-five dollars."

It is further provided by Title 51, Section 864, Code of Alabama 1940, as amended by Act No. 366, supra, that any veteran whose property, both real and personal, is valued at five thousand dollars ($5,000) or more shall be precluded from such exemptions; nor shall a veteran whose net annual income is two thousand and five hundred dollars ($2,500) or more be entitled to such exemptions.

I am, therefore, of the opinion that those disabled veterans properly qualified under the above statutes may also claim the exemption inquired about in your request for opinion.

I should also call to your attention that it has been held by this office in an opinion addressed to the Honorable W. W. Hill, Judge of Probate, Montgomery County, under date of September 17, 1945, (Quarterly Report of Attorney General, Vol. 40, page 50), that the legislation pertaining to exemptions of veterans, irrespective of disability, are independent enactments of temporary duration only, and were designed as a supplement to the legislation allowing the twenty-five dollars ($25.00) exemption to disabled veterans. No conflict exists between the legislation restricted to disabled veterans and the legislation providing the temporary exemption for all veterans, whether disabled or not. The result is, therefore, that a disabled veteran of World War II may, provided he qualifies under the other provisions of law, claim both the twenty-five dollars ($25.00) exemption and the thirty-five dollars ($35.00) exemption for a period of six years, and may apply such credits, amounting to sixty dollars ($60.00), in payment of two or more licenses, whether they are state, county, or municipal licenses.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 29, 1948.

Hon. O. E. Cole,
Court of County Commissioners,
Russell County,
Phenix City, Alabama.

Counties—Desertion—Non-support.

After conviction of person under provisions of Title 34, Section 90, Code of Alabama 1940, and when such person has

been sentenced to hard labor for the county, county is required to pay fifty cents per day for use of dependents. Title 34, Section 91, Code of Alabama 1940.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of June 11, 1948, is as follows:

"As Chairman of the Court of County Commissioners of Russell County, Alabama, I am requesting an official opinion upon the following state of facts:

"A man was prosecuted and convicted for the abandonment of his family under Title 34, Section 91 of the Code of Alabama 1940. After his conviction and sentence to twelve months hard labor for the County, a claim was filed with this Commission claiming fifty cents per day from the general fund.

"Is this a lawful claim against the County?"

You state in your inquiry that the person here considered was convicted under the provisions of Title 34, Section 91, Code of Alabama 1940. In truth and in fact, this person was convicted under the provisions of Title 34, Section 90, Code of Alabama 1940.

However, your attention is directed to the provisions of Title 34, Section 91, Code of Alabama 1940, which read in pertinent part as follows:

"§ 91. Payment by county for wife or child:—When any such person is so sentenced to hard labor for the county, the county from which said person is so sentenced shall, out of the general funds of said county, pay fifty cents for each day said prisoner is so confined at hard labor, to the clerk of probate, domestic relations or juvenile court, as the case may be, for the use of the defendant's wife or for the use of his child, or children, under eighteen years of age, or both, as the case may be; * * * * *."

It appears from the above that it is mandatory upon the county to pay to the clerk of the court in which such person was convicted the sum of fifty cents per day for the use of the wife and minor children of such convicted person.

You are therefore advised that the payment of this sum is a legal claim against your county and should be paid.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 29, 1948.

Hon. Bovell Summers,
Tax Assessor,
Etowah County,
Gadsden, Alabama.

Municipalities—Taxation—Annex Territory.

Municipal taxes for tax year October 1, 1948 to October 1, 1949 are due and delinquent on October 1, 1948 on property annexed into the City of Attalla on November 19, 1947.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of January 22, 1948, is as follows:

"As Tax Assessor for Etowah County, Alabama I hereby respectfully request an official opinion on the following set of facts, to-wit:

"I am Tax Assessor for Etowah County, Alabama, and I therefore desire to know when to begin assessing city taxes on territory that was voted into the City of Attalla on November 19, 1947."

I have been advised by you that the City of Attalla has adopted an ordinance as provided by Title 37, Section 698, Code of Alabama 1940, which ordinance provides that the municipal tax year begin on October 1st of each year and end on the 30th day of the next succeeding September.

It is my opinion that you should assess city taxes on October 1, 1948 for the tax year beginning October 1, 1948, on property which was annexed into the City of Attalla on November 19, 1947.

Your attention is invited to the case of **Johnson v. State,** 245 Ala. 499, 17 So. 2d 662. In that case the facts were as follows: Certain annexed property was incorporated into the City of Birmingham on August 11, 1943 pursuant to a local act of the legislature; the rate of the tax levied by the City of Birmingham for the tax year commencing October 1, 1943 was fixed by an ordinance adopted May 25, 1943; the Tax Assessor of Jefferson County is, by virtue of such office, the Tax Assessor for the City of Birmingham. The Alabama Supreme Court held in that case that the annexed territory of the City of Birmingham was subject to the municipal taxes for the tax year commencing October 1, 1943, and such taxes became due and delinquent on October 1, 1943, which was the date when the state and county taxes for the preceding year became due and delinquent.

You are, therefore, advised that it is my opinion that the municipal taxes referred to in your request should be computed by you for the tax

year beginning October 1, 1948 and ending September 30, 1949, which taxes will become due and delinquent on October 1, 1948. See Quarterly Report of Attorney General, Vol. 48, page 192.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 29, 1948.

Hon. U. B. Sullivan,
Tax Collector,
Pickens County,
Carrollton, Alabama,

Municipalities—Taxation—Tax Collector.

1. County tax collector must pay to the treasurer of the municipality the special taxes collected for the municipality.

2. Election on special tax under 8th Amendment to Constitution of Alabama 1901 may be held as often as ordered by governing body of municipality (except that after defeat of proposal to levy such special tax, no second election for such purpose shall be held in one year), and there is no limit on the number of years for which such special tax may be levied.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion is as follows:

"Under the provisions of Amendment No. 8 of the Constitution of the State of Alabama, the Town of Aliceville and the Town of Reform, each being in Pickens County, Alabama, have voted an additional tax of one half of one per cent on the property situated in said towns to be used for school purposes and, under my construction of the law, it becomes my duty to collect such taxes as they become due.

"The question has been raised in this county as to whom I should pay said taxes, when collected. I will therefore, appreciate your advising me:

"1st. Whether I should pay such taxes when collected to the Town Treasurer of said towns or to the Custodian of School Funds for the district in which said town is located, there being only one Custodian of School Funds for all of Pickens County;

"2nd. Can the Town Council of either of said towns pledge future taxes to be collected under such levy, assign the same and

thereby authorize me to pay the same to the person to whom assigned, or, is the management or appropriation of such taxes under the supervision of the County Board of Education, to be paid out only on their order;

"3rd. If such taxes are voted for a period of ten years, can said town, before the expiration of said ten years, call another election and vote to extend the time for another ten years or for a specified period, and is there a limitation on the number of years for which the tax can be voted;

"As I am now collecting these taxes and the time for remitting such collections is here, I will appreciate your opinion as soon as you can let me have the same."

I am of the opinion that you should pay the special taxes collected by you to the Town Treasurers of Aliceville and Reform. Your attention is invited to Title 37, Sections 709, 710 and 711, Code of Alabama 1940, which provide for the payment of all such taxes collected by the county tax collector to the treasurers of such municipalities:

"709. Report of tax collector.—The tax collector, in making his monthly report, as required to be made under the law in regard to state and county taxes, shall embrace in each of such reports a statement setting forth the taxes collected by him for such municipalities during the preceding month, and up to the date of such report, subsequent to his preceding report, and a copy of each report shall be by the collector forwarded to the mayor or other presiding officer of such municipalities within five days after making such report **the collector must pay to the treasurers of such municipalities monthly** at the same time he is required to make payment of taxes collected for the state and county, all municipal taxes then due from him to such municipalities before that time collected. The treasurers of such municipalities shall give the county tax collector a receipt in duplicate for the amount received, one of which duplicates shall be promptly forwarded to the department of revenue by the tax collector." (Emphasis added.)

"§710. Settlement by tax collector.—**The county tax collector must, each year make a final settlement under oath with the treasurers of such municipalities,** at the time he is required to make settlement with the state and then **pay over to the treasurers of such municipalities** the balance of the municipal taxes due from him as such tax collector and not paid over prior to the date according to the tax books in the office of the judge of probate of that county in which such municipalities are situated." (Emphasis added.)

"§711. Account by tax collector.—The county tax collector shall not be required to make or keep a separate account of any special taxes collected for any such municipalities but shall keep such account only in gross of the total tax levied by the municipality. If

any part of the tax collected by the municipality is set apart by the laws for any special purpose, the treasurers or persons acting as such for such municipalities shall as the law may direct keep a separate account and distinct fund as required by law arrived at and set apart by the treasurers from the amount paid into the treasury by the tax collector in proportion as such special tax levied bears to the total taxes levied by such municipalities, and the special taxes received by such treasurers shall be disbursed by them as required by law."

In view of the above quoted statutory provisions, I am of the opinion that the answer to your first inquiry is that you should pay such special taxes as collected by you to the town treasurers of the respective towns for which they were collected.

In answer to your second inquiry, I am of the opinion that Title 37, Section 711, Code of Alabama 1940, prevents you from keeping a separate account of any special taxes collected for any such municipalities. Therefore, your second inquiry must be answered in the negative.

Your third inquiry is answered by the express provisions of the 8th Amendment to the Constitution of Alabama 1901, which is quoted in part

"The municipalities of * * * *, Aliceville, * * * *, * * * *, Reform, as follows:

* * * * shall have the power and right to levy and collect a tax of one-half of one per centum in any one year on property situated therein, based on the valuation of such property as assessed for state taxation for the tax year ending on the 30th day of September next, succeeding the levy; * * * * * * * * *. **Elections to authorize the levy of such special tax may be held as often as ordered by the governing body of the municipality** but when a proposition is submitted to the electors to levy a special tax for a specific purpose, and such proposition is defeated, no second election for the same purpose shall be held in one year thereafter." (Emphasis added.)

In view of the above quoted statutory provision, I am, therefore, of the opinion that your third inquiry must be answered in the affirmative, as the express provisions of the above quoted Constitutional Amendment clearly provide for the elections to authorize the levy of such special taxes to be held as often as ordered by the governing body of the municipality, subject to the limitation contained therein. Also, there is no specific limitation on the number of years for which the tax can be voted.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Hon. L. B. Stephens,
Administrative Assistant,
Board of Pardons and Paroles,
Montgomery 5, Alabama.

Probation—Period of Probation.

1. When a defendant is convicted and sentenced for two offenses at same time, and placed on probation in each case, the period of probation runs concurrently and not consecutively when separate probation orders are silent on this issue.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of May 25, 1948, is as follows:

"The Board has asked that I request your official opinion on the following question:

"When a person is convicted of two or more offenses at the same time and is placed on probation by the sentencing judge on two or more cases under the same date and the probation orders are silent as to whether or not the probation is to run concurrently or consecutively, does the probation period run concurrently or consecutively?

"There are many probationers in Alabama who have a situation as explained above, and the question has arisen as to when they should be discharged from probation, thus the above question."

In my opinion, the probation period referred to in your inquiry would run concurrently. This conclusion is qualified as outlined in the opinion.

In an opinion of the Attorney General, rendered under date of May 16, 1941, Quarterly Report of Attorney General, Vol. 23, page 145, it was held in effect that a person convicted for two offenses may receive the benefits of probation in each of those cases. For example, if an **offense** is committeed on January 15th and another offense is committed on January 16th, and the defendant is later tried, convicted and sentenced for the offense committed on January 16th, he is eligible for probation because he has not been previously convicted and sentenced for the commission of a crime involving moral turpitude. Title 42, Section 19, Code of Alabama 1940. The defendant may then be tried, convicted, and sentenced subsequent to the first trial, but for the **offense** committed on January 15th. The opinion above cited holds that the defendant is eligible for the benefits of probation after the second trial, conviction, and sentence for the reason that the **offense** was committed

prior to the second offense and that the term "previously convicted" has reference to the time of the offense and not to the time of application for probation. Title 42, Section 19, Code of Alabama 1940.

Admittedly, this situation could occur when offenses are committed at different times on the same day, instead of different dates. Under this ruling, it would be possible for a defendant to commit a separate crime every day in the week and later be convicted and sentenced in an inverse order and be eligible to receive the benefits of probation in each case. Courts having power to grant probation, however, in all probability would not allow such a result, even though such courts would have such power under the provisions of Title 42, Section 19, Code of Alabama 1940, as construed by our opinion under date of May 16, 1941, supra.

When a person is convicted of two or more offenses at the same time and placed on probation by the sentencing judge on two or more cases under the same date, and the probation orders are silent as to whether or not the probation is to run concurrently or consecutively, it is my judgment that the probation period runs concurrently. For example, if a defendant is sentenced on the same day for two offenses and is given a term of two years imprisonment in the penitentiary for each offense and is then put on probation by the court for two years, and each probation order is separate, it is my judgment that at the end of two years the defendant should be discharged from probation, assuming that he has complied with all the conditions. See Title 42, Section 24, Code of Alabama 1940, as amended by Act No. 426, General Acts 1945, page 666.

My conclusion in this matter is based upon the fact that the court granting probation has unlimited power in determining the period of probation in each case. Title 42, Section 24, Code of Alabama 1940, as amended, supra. A court placing a defendant on probation is not limited to the term of imprisonment imposed upon the defendant, but may prescribe any period of probation thought proper by the court. Quarterly Report of Attorney General, Vol. 23, pages 46, 49, headnote 2; Title 42, Section 24, Code of Alabama 1940, as amended, supra. It is my judgment that a court sentencing a defendant for two offenses at the same time and granting probation in each case in separate orders intends that the probation period in each case begin presently. I further believe that in granting probation to a defendant in two separate cases wherein sentence was imposed on the same date, the court granting the probation intends that the good behavior of the defendant should be considered as discharging the period of probation in each case beginning presently.

If the court granting probation in the situation outlined in your inquiry desired to have consecutive periods of probation, it would be a simple matter for the court at any time to extend the period of probation in one case or the other. To take another example, suppose a defendant is sentenced on the same day for terms of two years and three years; and suppose he applies for probation in each case and the trial court enters an order granting probation in each case and the period

of probation is fixed in one case at two years and in the other case at three years, it is my judgment that at the end of two years defendant would be discharged from probation in the one case and at the expiration of one more year would be discharged from probation in the other case, the first two years having counted in both cases. Should the trial court consider that a longer period of probation be necessary, the court could extend the term in one case or the other to five years or more.

Since it is possible, therefore, for a defendant to be put on probation in two cases, I conclude that the period of probation runs concurrently for the reason that: (1) The good behavior of the defendant is naturally and logically applicable to the satisfaction of the period of probation in both offenses, and (2) the court granting probation has unlimited power to extend the period of probation in either case and effectively require consecutive terms of probation if it so desires.

Yours very truly,

A .A. CARMICHAEL,
Attorney General.

June 29, 1948.

Hon. John E. Mandeville,
Clerk, Circuit Court,
Mobile, Alabama.

Courts—Recorder's Courts—Appeals—Bonds—Bail—Record.

1. When a defendant appeals from recorder's court to circuit court for trial de novo and makes bond required by Title 37, Section 587, Code of Alabama 1940, and otherwise complies with the statute, the circuit court acquires jurisdiction, which is not lost even if sureties have defendant arrested under Title 15, Section 209, Code of Alabama 1940, before his trial de novo.

2. Under circumstances outlined in 1 above, record should show original bond and endorsements thereof.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of May 20, 1948, is as follows:

"Your opinion is requested in reference to the following proposition:

"John Doe was arrested by a Police Officer of the City of Mobile for violating a section of the City Ordinance. The defendant was tried by the Recorder of the City of Mobile, was convicted on May

1, 1948, and gave notice of appeal in conformity with Title 37, Section 587, Code of Alabama of 1940. Within five days the defendant made an appeal bond with good and sufficient sureties. Subsequently and within the proper time the complaint, warrant, judgment of conviction, and appeal bond was filed in the Criminal Division of the Circuit Court and the case was docketed. After the case had been docketed in the Criminal Division of the Circuit Court the sureties on the appeal bond obtained a certified copy of the appeal bond and had the defendant rearrested.

"Question:

"1. The defendant was arrested on May 14, 1948, on the certified copy of the bond and on May 20 ,1948, is still in custody. Would the provisions of Title 37, Section 587, Code of Alabama of 1940, in reference to 'bond be given within five days from the date of the judgment, no appeal shall be allowed from such judgment' be effective and the sentence of the Recorder be put into effect? Or, would the case be tried in the Circuit Court as soon as it is possible to grant the defendant a speedy trial?"

In my opinion, the case against the defendant should be tried in the circuit court as soon as it is possible to grant the defendant a speedy trial.

From the facts stated in your inquiry, it appears that the defendant who had been convicted in the recorder's court complied with Title 37, Section 587, Code of Alabama 1940, and filed his appeal or appearance bond. Further, it appears from your inquiry that the appeal was filed by the city in the circuit court within the time allowed. In my opinion, after all the conditions of Title 37, Section 587, Code of Alabama 1940, have been met, jurisdiction was completely transferred to the circuit court. Of course, it has been held that a proper appeal bond in this type of case is jurisdictional, and that an appeal will be dismissed if the bond is not in compliance with the statute. **Doyle v. City of Mobile,** 12 Ala. App. 622, 68 So. 494; **Steele v. Town of Oxford,** 25 Ala. App. 529, 149 So. 722. In the case outlined in your inquiry, however, it appears that a proper bond had been executed and the cause transferred to the circuit court.

It is further my opinion that the fact that the sureties on the bond had defendant arrested before his trial in the circuit court did not have the effect of dismissing the appeal. Title 15, Section 209, Code of Alabama 1940. The defendant should be allowed to make a new bond, if possible, and whether a new bond is made or not, he should be granted a speedy trial in the circuit court, which, in my opinion, has not lost jurisdiction of the trial de novo.

I suggest that the final record and the record of any appeal from the judgment of the circuit court should contain a copy of the appeal bond from the recorder's court, together with a return or endorsement on said appeal bond showing that the sureties had defendant re-arrested

pursuant to Title 15, Section 209, Code of Alabama 1940. In the event a new bond is made, this should also appear in the final record or transcript on appeal.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 30, 1948.

Hon. James A. Hare, Solicitor,
Fourth Judicial Circuit,
Selma, Alabama;
and
Hon. George C. Johnson, Solicitor,
Eighth Judicial Circuit,
Athens, Alabama.

Officers—Solicitors—Compensation.

Act No. 421, General Acts 1947, page 310.

1. The provisions of Act No. 421, General Acts 1947, page 310, to the effect that in certain of the judicial circuits of the State, designated by a population classification, the circuit solicitor shall perform extra, new and additional duties for which additional compensation shall be paid violates no provision of the Constitution, or other laws of the State.

2. In those judicial circuits subject to the provisions of Act No. 421, supra, composed of more than one county, each of the counties concerned shall pay from their general fund their proportionate share of the amount designated by the Legislature as additional compensation for the performance of such new and additional duties.

Opinion by Assistant Attorney General Hardin.

Dear Sirs:

Your request for an official opinion, bearing date of March 26, 1948, is as follows:

"Reference is made to Act No. 421, H. 824, General Acts 1947 (Ms.), approved September 18, 1947.

"This is a general act with local application and purports to apply in all 'judicial circuits having a population of not less than one hundred forty thousand nor more than four hundred thousand, according to the last or any subsequent federal census.'

"According to the census of 1940, the judicial circuits falling within this population classification are:

"4th Judicial Circuit, comprised of Bibb, Dallas, Hale, Perry and Wilcox Counties.

"5th Judicial Circuit, comprised of Chambers, Lee, Macon, Randolph and Tallapoosa Counties.

"8th Judicial Circuit, comprised of Cullman, Lawrence, Limestone and Morgan Counties.

"13th Judicial Circuit, comprised of Mobile County.

"It is requested that you officially advise us whether or not this act applies to each of the above mentioned judicial circuits, and, if so, the manner in which the additional compensation provided for in Section 2 thereof should be paid in such of those judicial circuits as are comprised of more than one county."

Your inquiry necessitates a construction of the provisions of Act No. 421, General Acts 1947, page 310. Due to the comprehensive nature of your inquiry, I deem it wise to here set out in extenso the pertinent provisions of such act, which are as follows:

"Section 1: That in addition to the duties now imposed by law on all circuit solicitors of the State of Alabama in judicial circuits having a population of not less than one hundred forty thousand nor more than four hundred thousand according to the last or any subsequent federal census, such solicitors shall perform the following extra, new and additional duties: (a) They shall carefully read and check the transcript of evidence in all criminal cases appealed from the circuit court of their judicial circuit to the Court of Appeals or the Supreme Court of Alabama, and call to the attention of the trial judge any errors or discrepancies that may appear in said transcript of evidence; (b) they shall, whenever requested by the Attorney General of the State of Alabama, file memorandum briefs in all criminal cases appealed from the circuit court of their judicial circuit to the Court of Appeals or the Supreme Court of Alabama; (c) they shall attend all hearings in their judicial circuit on application for probation and furnish the trial judge, or the judge hearing the application, with all information in their possession concerning the applicant for probation; and (d) they shall represent the Board of Registrars of the county comprising their judicial circuit in all civil suits for damages that are filed against said Board of Registrars arising out of the performance of their official duties, in either the circuit court of their judicial circuit or in the United States District Courts.

"Section 2: That for the performance of the extra, new and additional duties hereby imposed upon such solicitors, they shall be

paid additional compensation out of the general fund of the county comprising their judicial circuit in the amount of Twelve Hundred (1200.00) Dollars annually, such additional compensation to be payable in equal monthly installments on warrants drawn by such solicitors."

From the above provisions, it will be observed that such act is a general act with application only to those judicial circuits of the State having a population of not less than one hundred forty thousand persons nor more than four hundred thousand persons. Reference to the Federal census of 1940 discloses that only four of such judicial circuits fall within this population classification, those being the Fourth Judicial Circuit, comprised of Bibb, Dallas, Hale, Perry and Wilcox Counties; the Fifth Judicial Circuit, comprised of Chambers, Lee, Macon, Randolph and Tallapoosa Counties; the Eighth Judicial Circuit, comprised of Cullman, Lawrence, Limestone and Morgan Counties; and the Thirteenth Judicial Circuit, comprised of Mobile County alone.

Act No. 421, supra, further purports to impose upon the solicitor of each of these circuits extra, new and additional duties for the performance of which additional compensation in the amount of twelve hundred dollars annually is prescribed.

Considering the above provisions of Act No. 421, supra, I find nothing offensive to the Constitution or other laws of the State. The rule of law established by the consistent holdings of our courts with reference to the enactment of general laws with limited application is to the effect that where there is a substantial difference in population, and the classification is made in good faith, reasonably related to the purpose to be effected and to the difference in population which forms a basis thereof, and not merely arbitrary, it is a general law, although at the time it may be applicable to only one political subdivision of the State. Thus, the Legislature in passing a general law may use the population as shown by the Federal census, as a basis for classification of subdivisions of the State for purposes of special legislation applicable to the entire State, provided it is done in good faith and reasonably relates to the purpose to be effected and to the difference in population which forms the basis thereof. **Dearborn v. Johnson,** 234 Ala. 84, 173 So. 864; **State v. Gullatt,** 210 Ala. 452, 98 So. 373; **Walden v. Montgomery,** 214 Ala. 409, 108 So. 231; **Cobbs v. Home Ins. Co.,** 18 Ala. App. 206, 91 So. 627.

Applying the above rule of law to the instant case, it is my opinion that the classification therein provided for is a legitimate classification, reasonably related to the purpose to be effected and to the difference in population which forms the basis thereof. Considering the good faith in which such classification is made, I adhere to the accepted rule of statutory construction previously announced by the Supreme Court of Alabama that in construing an act it is one's duty to give to such act a construction which will sustain its validity, if it may be reasonably so construed, and that the legislative body is presumed to intend that legislative acts shall not violate the Constitution, and be utterly void. Any reasonable

construction will be given to effectuate such intent. **Dixon v. State,** 232 Ala. 150, 167 So. 349; **State v. Merrill,** 218 Ala. 149, 117 So. 473; **Walden v. Montgomery,** supra; **Dillon v. Hamilton,** 230 Ala. 310, 160 So. 708; and **Stone v. State ex rel Courtney,** 233 Ala. 239, 171 So. 362. I am, therefore, of the opinion that such act was lawfully enacted as general law despite the fact that such act has, at the present, a limited application.

Next, considering the provisions of such act imposing extra, new and additional duties upon the solicitors of the designated circuits and the payment of additional compensation for the performance of such duties, I find nothing therein offensive to the Constitution, or laws of the State. As was stated by the Supreme Court of Alabama in the case of **Tayloe v. Davis,** 212 Ala. 282, 102 So. 433,

> "(11) It has now been long declared by this court that for new and additional duties an incumbent of a public office may be awarded extra compensation without a violation of sections 118 or 281, forbidding an increase of salary during the term. It may be said a rule of legislative policy has grown up by the sanction of this court's construction of these sections.
>
> "We think there is no need to review the ground of these decisions. We may say that while a public officer takes his office cum onere, and is required to perform the duties from time to time prescribed by law, there is inherent justice in granting compensation for the increased labor and responsibility imposed by new legislation. The just legislator may be rather disposed to create a new office, than to impose unexpected new burdens on an existing officer without compensation. Nor do we think any sound objection obtains to conferring new duties, with compensation, upon the officer who, by reason of knowledge and experience, is best fitted to the new task. Fitness for the new duties growing out of experience in former official labors may furnish the opportunity to get efficient service at minimum expense to the state. * * *"

In my opinion, the extra, new and additional duties imposed upon the solicitors here in question by Act No. 421, supra, are actual, real and substantial duties and not a mere colorable pretext to increase the salaries of such officers. It is, therefore, my judgment that such act insofar as it imposes extra, new and additional duties upon such officers and provides additional compensation for the performance thereof, was validly and lawfully enacted.

I must lastly consider the provisions of Section 2 of Act No. 421, supra, wherein the method of payment of the additional compensation granted is outlined. Such section provides that "they shal be paid additional compensation out of the general fund of the **county** comprising their judicial circuit in the amount of Twelve Hundred (1200.00) Dollars annually, such additional compensation to be payable in equal monthly installments on warrants drawn by such solicitors." (Emphasis supplied).

It appears that some question arises due to the use of the word "county" in the singular whereas certain of the circuits affected by the provisions of said act are composed of more than one county. In my opinion, to defeat the obvious purpose of such act by giving to this section such a narrow construction would not be in keeping with the spirit and intent of our lawmakers.

It is provided within Title 1, Section 1, Code of Alabama 1940, that:

> "* * * Words used in the masculine gender include the feminine and neuter; the singular includes the plural, and the plural the singular. * * *."

It is also an accepted rule of statutory construction that statutes will be construed to effect legislative intent and avoid unjust or absurd conclusions. Such statutes should be construed according to the manifest purpose and intent of the lawmakers, and such purpose should not be defeated by narrow construction based upon nice distinctions in the meaning of words. **Thomason v. Court of County Commissioners,** 184 Ala. 28 63 So. 87. All particular rules for construing statutes must be regarded as subservient to the end of determining legislative intent. **Middleton v. General Water Works & Electric Corporation,** 25 Ala. App. 455, 149 So. 351.

A literal interpretation which would defeat the purpose of a statute will not be adopted if any other reasonable construction can be given to it. **Thompson v. State,** 20 Ala. 54; **Jefferson County v. Hawkins,** 233 Ala. 398, 168 So. 443; **Long v. Talladega National Bank,** 236 Ala. 366, 182 So. 14.

Where terms of a statute do not indicate with reasonable certainty their intended application to particular cases, though their general intent and application are clear, they should be given such construction as is conducive to fairness and justice and in harmony with the general spirit and policy of the statute, rather than one offensive thereto, if such construction is reasonably consistent with the language used. **Cole v. Gullatt,** 241, Ala. 669, 4 So. 2d 412.

Bearing all the above rules of statutory construction in mind, it is my opinion that the, perhaps inadvertent, use of the word "county" in the singular should not be seized upon to defeat the spirit, intent and purpose of this act, and that such spirit and intent should be given effect and the purpose of such act accomplished.

It was entirely with the Legislature to determine the manner in which such additional compensation be paid and the source from which such compensation should come. **State v. State ex rel Courtney,** supra. It was also within the province of the Legislature to prescribe the formula, or method, by which each of the counties of the several judicial circuits concerned would pay their proportionate share, as in the case of court reporters, etc. In the absence of any such formula or prescribed method within the provisions of Act No. 421, supra, it is my opinion that it can only be said that it was the intention of the Legislature that each

of the counties concerned pay from their general fund their proportionate share of the amount designated by the Legislature as additional compensation for the extra, new and additional duties to be performed by the solicitor of the circuit of which each of such counties is an integral part. That is, as in the case of the Fourth Judicial Circuit which is composed of the counties of Bibb, Dallas, Hale, Perry and Wilcox, that each of such counties pay their proportionate share, or one-fifth, of the additional compensation provided for. A like result would be reached in the cases of the Fifth and Eighth Judicial Circuits, while in the Thirteenth Judicial Circuit, no such question arises as such circuit is composed of Mobile County alone.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 30, 1948.

Hon. Emmett Perry, Solicitor,
10th Judicial Circuit,
Birmingham, Alabama.

Airports—Sunday Laws—Criminal Laws—Military and Naval Affairs.

1. Sunday morning flying of airplanes in close proximity to churches can, under certain circumstances, constitute a willful disturbance of religious worship, in violation of Title 14, Sections 117 and 119, Code of Alabama 1940.

2. Military personnel in time of peace are subject to civil jurisdiction and prosecution for violation of criminal laws. 74th Article of War, 10 U. S. C. A., Section 1546.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of April 22, 1948, is as follows:

"There are present in my office as I dictate this letter representatives of approximately twenty-five churches that are located around the Municipal Airport here in Birmingham. They state that various flying units consisting of Alabama National Guard, the United States Organized Reserve, the Naval Reserve and private flying concerns do a maximum amount of flying between the hours of 9:30 A. M. and 12 Noon on Sunday. They further state and, incidentally, have proved to my satisfaction that it is well-nigh impossible to conduct religious services on Sunday mornings due to the excessive noises

arising out of take-offs, landings and maneuverings of airplanes a few feet to a few yards over the tops of these churches.

"They have called my attention to Title 14, Section 117 of Code of Alabama 1940 making it a misdemeanor for 'any person who willfully interrupts or disturbs any assemblage of people met for religious worship by noise, * * * or any other act.'

"They insist that after repeated warnings with no results that such conduct on the part of air personnel constitutes 'wilful interruption.'

"Therefore, may I request your opinion on this matter with answers to these questions:

"(1) Do such acts constitute a violation of wilfully interrupting religious worship where same continues after repeated warnings to those in charge; (2) If such acts are a violation of the law, does the state have jurisdiction to prosecute personnel of Field Military reserve units?

"I should appreciate your consideration of this problem as soon as convenient."

Title 14, Section 117, Code of Alabama 1940, provides that:

"Any person who wilfully interrupts or disturbs any assemblage of people met for religious worship, by noise, profane discourse, rude or indecent behavior, or any other act, at or near the place of worship, shall, on conviction, be fined not less than twenty nor more than two hundred dollars and may also be imprisoned in the county jail, or sentenced to hard labor for the county for not more than six months."

Title 14, Section 119, Code of Alabama 1940, in part provides that:

"Any person who willfully disturbs any assemblage of people who have met together for instruction, amusement or any other lawful purpose, shall be guilty of a misdemeanor, and, on conviction shall be punished by a fine of not exceeding five hundred dollars, or by imprisonment in the county jail, or hard labor for the county for not more than six months, one or both at the discretion of the court or jury trying the case. * * * * * "

In construing Section 117, supra, our State's highest court has said that it matters not as to the nature or form of worship. It is sufficient if the exercises are intended as a celebration of the birth, life, death, and resurrection of our Savior, and in commemoration of the beginning of the Christian era. **Stafford v. State,** 154 Ala. 71, 45 So. 673.

It has further been held that it is not necessary that the disturbance be in the house or that the people disturbed be in the house. If a part

of the assemblage has withdrawn from the house with the expectation of returning, they are still a part of the assemblage and a disturbance of them will be in violaiton of this section. **Adair v. State,** 134 Ala. 183, 32 So. 326. "Sunday School" comes within the protection of the statute. **Millican v. State,** 26 Ala. App. 104, 153 So. 891.

The statute penalizes only the willful disturbance of a religious assemblage. Therefore, the act must be **willful. Nix v. State,** 27 Ala. App. 388, 173 So. 98. Nevertheless, a purpose and intent to disturb is not a necessary factor in the crime; on the contrary, any act, which is within the terms of the statute, the natural consequence of which is to disturb, and which is willfully done, and which in fact does disturb an assembly of people, met for religious worship, comes under the denunciation of the law, though the actor may have no intent to disturb the assembly. **Salter v. State,** 99 Ala. 207, 13 So. 535; **Culpepper v. State,** 32 Ala. App. 276, 25 So. 2d 56.

Coming now to your first question, I am of the opinion that willful Sunday morning flying of airplanes in close proximity to churches does constitute a violation of Sections 117 and 119, supra, when done under conditions such that propeller and engine noise seriously interrupt and disturb religious or other public assemblages. Whether a particular flight over a church creates such noise as to constitute a willful disturbance is a question of fact which must be decided in each individual case. Much will depend upon variables such as weather conditions, type and make of the airplane and engine, propeller pitch and altitude.

Freedom to worship is a cornerstone in our democratic system of government, jealously safeguarded since the founding of the state and nation. That which interferes with the right is an encroachment upon the right. In my judgment, scientific progress, even in the present day "Air-Age," can find in the law no justification for the partial or complete abridgement of that right.

Therefore, in my judgment, if the natural consequence of Sunday morning flying is to interrupt and disturb religious worship, the statute is violated even though the pilot entertains no specific intent or purpose to disturb and may, if he knows and thinks of the matter, regard the disturbance as necessary because of prevailing flying conditions. See **Salter v. State,** supra.

Coming to your second question, it is my opinion that in time of peace a person in the military service who, in any portion of a state or territory not within the exclusive jurisdiction of the United States, commits a criminal offense recognized and made punishable by law of the state or territory, is answerable to the state or territorial courts for such offenses. 74th Article of War, 10 U. S. C. A., Section 1546; **United States v. Lewis** (C. C. Pa. 1904) 129 Fed. 825 (affirmed (1906) 26 S. Ct. 229, 200 U. S. 1, 50 L. Ed. 343).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 30, 1948.

Hon. Frank A. Boswell, Director,
Department of Corrections & Institutions,
Montgomery, Alabama.

Sheriffs—Department of Corrections and Institutions—Mileage Fee.

1. The Department of Corrections and Institutions is not authorized to pay the sheriff ten cents per mile for executing writ of arrest when sheriff arrests parole delinquent.

2. Warrant issued by the Department of Corrections and Institutions under Title 42, Section 10, Code of Alabama 1940, is not a warrant issued from a court of competent jurisdiction entitling sheriff to claim mileage fee provided by Act No. 177, General Acts 1947 (Ms.), approved July 21, 1947.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of October 28, 1947, is as follows:

"Can the Department pay Sheriffs mileage for the arrest of Parole delinquents, it is true that Act #177 was passed and approved to pay Sheriffs mileage under certain conditions during the 1947 regular session.

"For your ready reference I am enclosing our first statement for Sheriff mileage for the arrest of Parole Delinquent which after serving your purpose please return to us for further handling."

In my judgment, the Department of Corrections and Institutions is not authorized to pay sheriff's mileage for the arrest of parole delinquents under the provisions of Act No. 177, General Acts 1947 (Ms.), approved July 21, 1947. The Act referred to in your inquiry provides, in Section 1 thereof, as follows:

"Any sheriff of the State of Alabama, who serves or causes to be served a writ of arrest, or who causes to be arrested, or like process issued by any court of competent jurisdiction, in Alabama, in any criminal or quasi-criminal proceedings, shall be entitled, on conviction of the defendant, to receive for such service a sum equivalent to ten cents per mile for each mile traveled within the county of the arrest from the court house by the most direct route to the point of arrest and return. Mileage for only one trip to make the arrest may be charged."

You will note that the sheriff is entitled to this mileage fee when this writ of arrest or other process issues from a "court of competent jurisdiction."

In my judgment, the warrant issued by the Director of the Department of Corrections and Institutions, under the provisions of Title 42, Section 10, Code of Alabama 1940, is not a warrant issued from a court of competent jurisdiction. For that reason, therefore, the Department would not be authorized to pay the sheriff's mileage.

The law of fees and costs must be held to be penal, and no fees must be demanded or received except in cases expressly authorized by law. Title 11, Section 1, Code of Alabama 1940.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 30, 1948.

Hon. Lecil Gray,
Judge of Probate,
Walker County,
Jasper, Alabama.

Filing Tax—Trust Indenture—National Bank—Exemptions.

Where national bank is mere trustee in trust indenture to secure payment of debt, said bank not owning any of the debt, the filing tax as provided by Title 51, Section 619, Code of Alabama 1940, must be collected before said trust indenture is recorded.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of June 17, 1948, is as follows:

"The Bankhead Homesteads Hosiery Corporation, an Alabama corporation doing business in Walker County, recently borrowed the sum of $100,000.00 from the Jefferson Standard Life Insurance Company of Greensboro, North Carolina and in so doing a trust indenture was executed by the Bankhead Homesteads Hosiery Corporation and by Security National Bank of Greensboro, as Trustee. This trust indenture, of course, is in the nature of a mortgage and under its terms the Bankhead Homesteads Hosiery Corporation conveyed or mortgaged its property to the Security National Bank of Greensboro, as Trustee.

"The Security National Bank of Greensboro is a national banking association and the question has arisen as to whether or not this trust indenture is subject to the mortgage tax specified in Title 51, Section 619 of the Alabama Code of 1940. It is my understanding that a mortgage or trust indenture to a federal agency such as a national bank or national banking association is not subject to the tax in question, but I am not clear in this instance since the national banking association is the trustee and not the lending establishment.

"Your providing me with your opinion on the matter will be greatly appreciated."

I am assuming that the national bank does not own any of this debt and is merely a trustee for the payment of the debt to the Life Insurance Company. It is, therefore, my opinion that before the trust indenture is filed for record, the filing tax as provided by Title 51, Section 619, Code of Alabama 1940, must be collected. See opinion of this office under date of November 28, 1932, to Honorable E. A. Hammett, Judge of Probate, Talladega County, Alabama, Biennial Report of Attorney General, 1932-34, page 46, which held that where a national bank was a mere trustee and held none of the debt secured by a mortgage executed to itself as trustee, the mortgage filing tax was due to be paid. Cf. opinion of this office to Honorable Eugene H. Hawkins, Judge of Probate, Jefferson County, Alabama, under date of July 3, 1941, Quarterly Report of Attorney General, Volume 24, page 12.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 30, 1948.

Hon. C. C. Horton,
State Service Commissioner,
Department of Veterans' Affairs,
Montgomery 2, Alabama.

Taxation—Exemption—Veterans.

A veteran who is disabled to the extent of twenty-five per cent or more at the time of making application for license is entitled to the exemption provided for by Title 51, Section 852, Code of Alabama 1940, as amended by Act No. 564, General Acts 1943, page 562.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of April 30, 1948, is as follows:

"This Department would appreciate an official opinion, as quickly as possible, in connection with license exemptions to veterans, provided by Sections 852-864, Title 51, Code of Alabama 1940, as amended. The specific question presented is whether or not a veteran who has no service connected disability, and is also not entitled to non-service connected pension from the Veterans Administration by reason of total disability, is entitled to the exemption of $25 if he has disabilities to the extent of 25 per cent or more.

"We call your particular attention to Section 852 which provides that an honorably discharged Wartime veteran is entitled to the exemption, and to Section 859 which provides that the proof of disability may be made by a certificate of the county health officer of the county in which the veteran resides, or if there be no county health officer, a certificate by a reputable physician in the county in which the veteran resides. It will be noted that in neither of these Sections does it state that the disabilities of the veteran must have been incurred in the service, to be entitled to the exemption.

"As above stated, we would appreciate this opinion as quickly as possible."

I am of the opinion that your inquiry must be answered in the affirmative. Title 51, Section 852, Code of Alabama 1940, as amended by Act No. 564, General Acts 1943, page 562, specifically states that the veteran shall be physically disabled at the time of his application for license, and there is no mention in the said statutory provision which requires such disability to be a service connected one. This statutory provision reads in part as follows:

"Every bona fide permanent resident of the State of Alabama who served as an enlisted man in the United States army, navy or marine corps during the World War between April 6, 1917, and November 11, 1918, or in the Spanish American War between April 21, 1896 and July 4, 1902, * * * * * or any soldier, sailor or other person serving in the armed forces of the United States between December 7, 1941 and the termination of the existing War by the signing of a definite treaty of peace, and who, **at the time of his application for license,** as hereinafter provided for, shall be physically disabled to the extent of twenty-five percent, or more, shall, upon sufficient identification and upon sufficient proof of such disability * * * * *, be exempt from business or occupational license taxes to the extent, and subject to the conditions hereinafter specified. * * * * *." (Emphasis added.)

In view of the above quoted statutory provision which expressly states that the veteran must be disabled at the time of his application for license, I am of the opinion that, to qualify for the exemption, the

statutory provision does not require that the disabiliy be a service connected one.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 30, 1948.

Hon. J. H. Brennan, Commissioner,
Finance and Public Affairs,
City of Dothan,
Houston County,
Dothan, Alabama.

Act No. 273, S-292, Local Acts 1947 (Ms.)—Constitutional Law.

Neither Section 3 nor Section 24 of Act No. 273, S-292, Local Acts 1947 (Ms.) violates any of the provisions of the Constitution of Alabama 1901.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of December 30, 1947, is as follows:

"Referring to the bill passed by the State Legislature in its 1947 session putting the City of Dothan on a merit system basis, I am writing to ask if you will kindly interpret Section 24, 'POLITICAL ACTIVITIES OF DEPARTMENT HEADS PROHIBITED,' and advise as to the constitutionality of this section. You will note that this section carries a penalty of automatic forfeiture of the office or the position held by a city employee who violates the terms of the said Section 24. This penalty seems excessive, and I would like to know if same is in violation of our organic law.

"Another feature of this act on which you will please advise as to its constitutionality is Section 3, 'UNCLASSIFIED SERVICE.' This section exempts from the act all Department Heads. To me this is discriminatory and therefore unconstitutional, for the reason that Section 24 denies Department Heads the protection of the act, but this section places restrictions on their political activities. Please advise on this point also."

The act about which you inquire establishing a merit system for the employees of the city of Dothan is Act No. 273, S-292, Local Acts 1947 (Ms.), approved August 7, 1947.

You are advised that, in my opinion, neither Section 3 nor Section 24 of Act No. 273, supra, violates any of the provisions of the Constitution of Alabama 1901.

Title 55, Chapter 9, Code of Alabama 1940, contains the provisions applicable to the merit system established for employees of the State of Alabama.

The Supreme Court, in the case of **Heck v. Hall**, 238 Ala. 274, 190 So. 280, had occasion to consider the constitutionality of these provisions of the State law. The court, in a very thorough and exhaustive opinion, considered every conceivable constitutional objection to this law, and concluded that none of its provisions were unconstitutional. There is contained in the State law, namely, Title 55, Section 301, Code of Alabama 1940, a provision identical in legal effect with Section 3 of Act No. 273, supra. There is also contained in the State law, namely, Title 55, Section 371, a provision identical in legal effect to Section 24 of Act No. 273, supra. Therefore, since the Supreme Court has upheld the constitutionality of these identical provisions in the State law in the case of **Heck v. Hall, supra**, you are advised that, in my opinion, neither Section 3 nor Section 24 of Act No. 273, supra, violates any of the provisions of the Constitution of Alabama 1901.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 30, 1948.

Hon. Ward W. McFarland, Director,
Alabama State Highway Department,
Montgomery 4, Alabama.

Highways and Highway Department—Contracts.

Where a contract between the State Highway Department and a bonded road contractor provides that all excavation not included within the contract definition of "solid rock excavation" shall be classified as "common excavation," payment for excavation on the basis of an arbitrary intermediate classification is in violation of the terms of the contract and is tantamount to a donation prohibited by the Constitution of Alabama 1901, Section 93.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of April 23, 1948, is as follows:

"As Director of the Alabama State Highway Department, I respectfully request your official opinion as to the legal and proper procedure to be taken by me under the following circumstances:

"Under contract with the Alabama State Highway Department, McKee Construction Company undertook road construction work on Federal Aid Project F-309(1), Clarke-Monroe Counties. Among other things, the contract called for 392,600 cubic yards of common excavation @ $.27½ per cubic yard.

"As you doubtless know, the State Highway Department has prescribed 'Standard Specifications for Road and Bridge Construction' which constitute a part of all construction contracts of the character entered into with McKee. Among other things embodied in these standard specifications are definitions of solid rock excavation and of common excavation, as follows:

" 'Solid Rock Excavation. This Classification shall include all rock in ledges, bedded deposits and unstratified masses, in its original position, that in the opinion of the Engineer cannot be excavated without the continuous use of explosives and/or by the proper use of a current model power shovel of one cubic yard or more capacity; and shall also include detached boulders and rock measuring thirteen cubic feet or more in volume. It shall not include material surrounding such boulders that is designated in the common Excavation Classification.

" 'Common Excavation. This Classification shall include all loam, sand, clay, chert, gravel (loose or cemented), shale, slate, decomposed rock, old gravel, chert, or broken stone surfacing, and all other materials encountered that are not included in the Solid Rock Excavation Classification as above defined.'

"On the plan of the project mentioned above, there was a provision, which became a part of the contract with McKee Construction Company, as follows:

" 'All lime rock, shell rock, or Selma chalk common in this vicinity encountered on construction, shall be classified as and paid for as common excavation.'

"During the progress of the excavation work, McKee encountered formations which he was unable to excavate with the equipment he was then using; he asserted that they were formations not common in the vicintiy, not embraced with the definition of common excavation as that term is defined in the standard specifications, and not covered by the above mentioned special note because not common in the vicinity.

"In preparing the proposals for this project, it had not been contemplated that the contractor would encounter such formations

as McKee actually did encounter in the course of this work and no provision was made for rock excavation. When the situation was brought to the attention of this Department, there was uncertainty as to the character and the extent of the unusual formations which the contractor had thus encountered; he was directed by representatives of this Department to proceed with the excavation with the understanding that an appropriate adjustment would be made in his contract therefor, and that he would be compensated on a fair basis. In order to accomplish the excavation, McKee procured and used a two-cubic yard capacity shovel, and some explosives.

"At completion of the excavation work McKee Construction Company filed a claim for this excavation in the net amount of $44,658.28, contending that he had encountered in five cuts of the project material which should be classified as rock excavation, rather than as common excavation, and computing his additional compensation as based upon labor and rental on equipment necessarily employed by him for the removal of this material.

"This Department investigated the claim and there was a divergence of opinion among our engineers as to whether the excavation was 'rock' or 'hard material approaching rock' or 'common excavation.' Without substantial difference of opnion, 4076 cubic yards of the excavation was agreed to be rock. With respect to the remainder of the material in question, there was not unanimity of opinion. On recommendation of the Assistant Hghway Director, who had previously been Division Engineer in charge of this project at the time this excavation was accomplished, and after investigation, I resolved the conflicts of opinion and entered into a supplemental agreement on behalf of the Department with the contractor, which agreement I believed (and still believe) to have been fair and just both to McKee and to the State of Alabama.

"Under this agreement the claim was settled and it was agreed that McKee would be paid $1.50 per cubic yard for 4,076 yards of solid rock excavation and $.70 per cubic yard for 24,287 cubic yards of 'Hard Material approaching solid rock,' it being agreed that this was not 'common excavation' within the terms of the original contract and plans. The amounts to be paid were as follows:

"4,076 cubic yards solid rock @ ($1.50 — .275) 1.225 $4,933.10.
24,287 cubic yards hard material @ ($.70 — .275) .425 $10,231.98.

"This contract was approved by the Governor and a total of $15,315.08 was paid to the contractor as agreed. (Copies of the original contract and supplemental agreement are attached hereto as Exhibits 'A,' 'B' respectively).

"Thereafter, the Department of Examiners of Public Accounts made a 'Special Investigation' of the matters covered in the supplemental agreement, and called upon the State Geologist for his

opinion as to the nature of the material excavated from the mentioned cuts. The Department of Examiners then found that in their opinion, the excavation, other than 3,076 cubic yards was 'common excavation.' (The Department of Examiners now takes the position that 4,076 cubic yards is rock and the balance 'common excavation'). Accordingly the Department of Examiners of Public Accounts issued its report and charged illegal disbursement to McKee of $11,546.98 for excavation of 25,287 cubic yards of hard material which it says was 'common excavation'. (This figure was subsequently changed to charge illegal disbursement of $10,321.98 for 24,287 cubic yards of hard material. See Demand Letter, attached hereto as Exhibit 'C').

"The Department of Examiners demanded that this amount of $10,321.98 be settled by me, and recommended that this amount be deducted from retainage withheld from McKee Construction Company on this project. (Copy of the Examiner's Report is attached hereto as Exhibit 'D').

"I have ordered withheld $10,321.98 of the retainage which would otherwise be payable now to McKee Construction Company, until such time as I am advised by you.

"It is my view that as Highway Director, I had the right and duty to investigate and determine this claim of McKee; that I have in good faith exercised a discretion in the matter, and that the supplemental agreement executed by me with McKee, upon recommendation of the Assistant Director, and with the approval of the Governor, is a valid and binding agreement; and that the Department of Examiners and the Chief Examiner may not substitute their opinion in a matter of this kind for the decision of the Director of the Highway Department, made in good faith. Am I correct in my views?

"I also ask your opinion:

"(1) As to whether the supplemental agreement with McKee is a lawful and binding agreement.

"(2) As to whether the payment of $15,315.08 under the supplemental agreement, was legal or illegal, in whole or in part.

"(3) Whether I may lawfully continue to order withholding of $10,321.98 of the McKee retainage because of the Chief Examiner's holding that there has been an illegal payment of such amount to McKee for excavation which the Chief Examiner determines was 'common excavation'?

"(4) What steps may and must I take as Director of the State Highway Department to finally dispose of this matter, to protect myself, my bondsman, and the Department, and to do justice between

McKee and the State of Alabama, and to dispose of the Chief Examiner's claim of an illegal disbursement in the amount of $10,321.98?

"Your early advice will be appreciated."

The contract executed on August 13, 1946, between the State of Alabama and the McKee Construction Company, provides that the Alabama State Highway Department's "Standard Specifications for Road and Bridge Construction" are a part of the agreement.

Paragraph 208.02(1) of the said "Standard Specifications" provides:

"**Solid Rock Excavation.** This Classification shall include all rock in ledges, bedded deposits and unstratified masses, in its original position, that in the opinion of the Engineer cannot be excavated without the continuous use of explosives and/or by the proper use of a current model power shovel of one cubic yard or more capacity; and shall also include detached boulders and rock measuring thirteen cubic feet or more in volume. It shall not include material surrounding such boulders that is designated in the Common Excavation Classification."

Paragraph 208.02(2) of the said "Standard Specifications" then provides:

"**Common Excavation.** This Classification shall include all loam, sand, clay, chert, gravel (loose or cemented), shale, slate, decomposed rock, old gravel, chert, or broken stone surfacing, **and all other materials encountered that are not included in the Solid Rock Excavation Classification as above defined.**" (Emphasis supplied.)

Thus it is noted that the contract recognizes only two types of excavation, viz. (1) Solid Rock Excavation and (2) Common Excavation, and that the second classification is defined as all excavation not included within the contract definition of the first classification.

It is further noted that you, as State Highway Director, in seeking to renegotiate the contract, adopted an intermediate and new classification, viz. "Hard Material," not recognized by the contract. By means of the Supplemental Agreement, executed on November 17, 1947, you sought to bind the State of Alabama to pay for this intermediate classification at the unit price of seventy cents per cubic yard, and to pay for excavation of Solid Rock at the unit price of one dollar and fifty cents per cubic yard. The agreed price for Common Excavation had, by terms of the contract, been fixed at twenty-seven and one-half cents per cubic yard.

It is my opinion that you had no legal authority to authorize the disbursement of public funds upon the basis of such arbitrary intermediate classification. If the excavated material could not properly be classified as Solid Rock, it follows from the terms of the contract that it was

Common Excavation compensable at twenty-seven and one-half cents per cubic yard. The contractor was bonded in the penal sum of $246,-717.00 for faithful performance of the contract. Therefore, in my judgment your action of increasing his compensation to the extent of $10,321.98 was in violation of the terms of the contract and was tantamount to a donation in violation of the Constitution of Alabama 1901, Section 93. Pretermitting discussion of the question whether the Chief Examiner may substitute his opinion in a matter of this kind for the decision of the State Highway Director, in my judgment you cannot substitute your opinion for the express terms of the contract.

Coming now to consideration of your specific questions, they are answered in the order named:

(1) That part of the Supplemental Agreement which relates to payment for the excavation of "Hard Material" is not lawful and binding upon the State of Alabama. That part of the said agreement which relates to payment for the excavation of Solid Rock is lawful and binding, since no provision was made in the contract for the excavation of Solid Rock. Excavation of Solid Rock falls within the definition of "Extra Work," payment for which is provided for by Section 4.04 of the "Standard Specifications."

(2) The answer to your second question is found above; repeating, the payment of $10,321.98 for the excavation of 24,287 cubic yards of "Hard Material" at .425 cents per cubic yard, was an illegal payment. The payment of $4,993.10 for the excavation of 4,076 cubic yards of Solid Rock at $1.225 per cubic yard was a legal payment. The thirteenth paragraph of your request is in error in stating that this yardage figures $4,933.10.

(3) You may lawfully continue to withhold the sum of $10,321.98 from other and separate funds due the contractors by the State of Alabama on other and separate contracts. Your withholding of this amount has the legal effect of a set-off allowed by Title 7, Section 350, Code of Alabama 1940.

(4) You should continue to withhold the said sum of $10,321.98 and cover the same into the State Treasury, notifying the State Treasurer that the amount so covered is to be held in a suspense account until final disposition is made of the matter.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 30, 1948.

Hon. John Graves,
State Comptroller,
Department of Finance,
Division of Controls and Accounts,
Montgomery 4, Alabama.

Department of Finance—State—Funds—Corporations.

1. The Director of Finance is authorized to expend from the Equipment Purchase Fund appropriated within the General Appropriation Act (Act No. 320, General Acts 1947, p. 183), money for the purchase of furniture and equipment for the outfitting of lunchrooms for serving employees of the State.

2. The State of Alabama may purchase equipment, outfit, and operate lunchrooms for the convenience of its employees, in no violation of Section 93, Constitution of Alabama 1901.

3. The State of Alabama may purchase equipment for the furnishing of lunchrooms operated for the convenience of the employees of the State, and may lease such equipment or other facilities to the State Employees Social Club, if deemed advisable, under terms best designed to secure and protect the interests of the State and to accomplish the purposes desired.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of June 16, 1948, is as follows:

"I am desirous of obtaining your official opinion relative to the following question.

"The State Employees Social Club is a non-profit association organized in accordance with Title 10, Sections 139-149, Code of Alabama 1940, and is organized for the benefit, health, and welfare of the state employees of the State of Alabama by affording to such employees lunch room and recreational facilities in the vicinity of the State Capitol Building, the State Highway Department Building, and the building housing the State Department of Industrial Relations.

"The association was organized and commenced operations on March 1, 1947, without any funds on hand. The association, at that time, was obligated in the amount of approximately $9,000.00, said obligation representing equipment purchased from the former private operators of such concessions. In addition thereto, the asso-

ciation obligated itself in the amount of approximately $3,000.00 for stock and merchandise for the supply of such lunch rooms. This obligation for merchandise and other supplies over the period of time since organization has increased to approximately $6,000.00.

"Since its organization, the association has reduced its obligation owed for the purchase of equipment by approximately $4,000.00. This obligation is represented by a note or series of notes held by the Union Bank and Trust Company, payable in monthly installments of $318.00, with the equipment purchased pledged as security therefor.

"As a result of a recent reorganization, the association is now operating with a small profit. However, such profit is wholly inadequate to ever retire the outstanding obligations against the association.

"It is felt that if, in some manner, the association could be relieved of this outstanding obligation for the purchase of equipment, that said association could operate at a substantial profit, meeting all current operating expenses and in time retiring all other obligations now held against such association.

"Your opinion is respectfully requested as to whether the Director of Finance would be authorized to expend from $15,000.00 appropriated by Act No. 320, General Acts of 1947, page 183 (General Appropriations Act) for office furniture and equipment for the executive, administrative, and judicial departments, the sum remaining due on said equipment, such equipment then becoming the property of the State of Alabama as other personal property purchased from such fund.

"If your answer to the above is in the negative, will you please advise if there is any fund from which this expenditure may legally be made.

"The creditors of the association are demanding that some settlement be made of the above obligation by July 1, 1948, therefore, your opinion prior to that date would be appreciated."

Answer to your inquiry turns upon the interpretation or construction to be given the terms "furniture" and "equipment" as used within that portion of the General Appropriation Act of 1947, (Act No. 320, General Acts 1947, page 183), wherein $15,000 annually is appropriated for the purchase of office furniture and equipment for the executive, administrative, and judicial departments. You inquire as to whether, under the authority of such appropriation, the Director of Finance is authorized to purchase furniture and equipment for the lunchrooms located in three of the state buildings, one located in the State Capitol, another in the State Highway Department building, and a third in the

building housing the State Department of Industrial Relations. These lunchrooms, you inform me, are operated for the purpose of furnishing lunching and recreational facilities to the State employees working within the vicinity of these buildings. You also inform me that such lunchrooms are presently operated by the State Employees Social Club, which has entered into agreement for the purchase, from private owners, of the furnishings with which such lunchrooms are now equipped, but that such Club now finds itself unable to meet the obligations of such agreement. You, likewise, set out other facts concerning the organization and present financial status of such Club, few of which I deem pertinent to the material question here involved.

In my opinion, the Director of Finance is authorized to expend from the fund above-mentioned, which I shall designate as the Equipment Purchase Fund, money for the purpose of furnishing and equipping lunchroom facilities for State employees. In my opinion, the accepted use of the term "furniture and equipment" includes within its meaning such fixtures or appliances.

In Webster's New International Dictionary, Second Edition, page 865, the word "equipment" is defined as:

> "Material or articles used in equipping, * * *"

Likewise, within this same work, upon page 1021, the word "furniture" is defined as meaning

> "That with which anything is furnished or supplied; supplies; outfit; equipment.
> * * * * *
> "Articles of convenience or decoration used to furnish a house, apartment, place of business or of accommodation, etc.; movable articles such as chairs, tables, beds, cabinets, desks, stoves, etc.; as parlor furniture; kitchen furniture; office furniture; * * *."

Referring to 14 Words and Phrases (Per. Ed.), Equipment, 772, it is found that there the term "equipment" is given a like meaning as that set out above, it being there stated that the term "equipment" is broad and may include articles which are attached to the building as an integral part thereof, as well as articles not belonging to that category.

Within 17 Words and Phrases (Per. Ed.), Furniture, 947-848, it is stated that:

> "* * * * Word 'furniture' is defined as that with which anything is furnished or supplied; supplies; outfit; equipment; articles of convenience or decoration used to furnish a house, apartment, place of business, or of accommodation. * * * * *
>
> "* * * * Furniture ordinarily means that with which anything is supplied; the equipment or outfit of a trade or business; whatever

may be supplied to a stock of goods or to a business to make it convenient, useful, or gainful; and hence an instruction that the machinery, tools, apparatus, appliances, implements, instruments, and such like articles used in carrying on the business would not be furniture is erroneous. Brody v. Crittenden, 76 N. W. 1009, 1010, 106 Iowa, 524. * * *"

In the case of **Fore v. Hibbard,** 63 Ala. 410, the Supreme Court of Alabama had occasion to define the word "furniture" and there stated as follows:

"* * * * The word relates, ordinarily, to moveable personal chattels. It is very general both in meaning and application, and its meaning changes, so as to take the color of, or be in accord with, the subject to which it is applied. Thus, we hear of the furniture of a parlor, of a bed-chamber, of a kitchen, of shops of various kinds, of a ship, of a horse, of a plantation, *&c. The articles, utensils, implements, used in these various connections, as also those used in a drug or other store, as the furniture thereof, differ in kinds according to the purposes which they are intended to subserve; yet, being put and employed in their several places as the equipment thereof, for ornament, or to promote comfort, or to facilitate the business therein done, and being kept, or intended to be kept, for those or some or one of those purposes, they pertain to such places respectively, and collectively constitute the 'furniture' thereof. * * *"

It is, therefore, my opinion that the term "furniture and equipment" is broad enough to include within its meaning those facilities necessary for the equipping of lunchrooms for State employees.

It is also to be observed that such appropriation includes within its scope furniture and equipment for the executive, administrative, and judicial departments, excluding therefrom only the legislative. It is my opinion that this was an effort to include all departments of the State Government, and the subdivisions thereof, having continuous duties and fixed places of duty. Although the furniture or equipment here in question is not for the sole use and enjoyment of any one particular department or other subdivision of the State government, and might not strictly be deemed to be office furniture or equipment supplied for use by any one of such departments or subdivisions, it is my judgment that the installation and maintenance of lunching facilities in the locations designated by you in your request would add materially to the comfort, health, welfare and well-being of all employees of the executive, administrative and judicial departments of the State.

Such a situation, in my opinion, is anticipated and provided for within Title 55, Section 61, Code of Alabama 1940, wherein the general purposes and authority of the Department of Finance are set forth, it being there stated that such Department shall:

"* * * furnish the physical facilities, equipment and supplies and, to the extent herein indicated, the personnel for the operation of the state and such departments, boards, bureaus, commissions, agencies, offices and institutions thereof. * * *"

It is obvious that such duty and authority restricts itself to no single department or other subdivision of the State government but includes within its scope all executive, administrative and judicial functions of the State. It is, therefore, my opinion that such authority is broad enough to include within its meaning purchase of furnishings and equipment for lunchrooms established for the convenience of State employees situated in the three locations mentioned by you in your request.

The answer to your first inquiry is, therefore, in the affirmative, it being my opinion that the Director of Finance is authorized to expend from the Equipment Purchase Fund money for the purchase of equipment for the outfitting of lunchroom facilities for State employees located in the buildings you have designated, such purchases to be made by the Purchasing Agent under the authority of Title 55, Section 108, Code of Alabama 1940, in the same manner as other personal property of the State is purchased, paying no more than a reasonable market value for such equipment.

From your request, I gather that the present equipment located in such lunchrooms is owned in part by the individual from whom originally purchased by the Club, with the Club itself owning a substantial equity therein. In the event the Director of Finance, through the Purchasing Agent, sees fit to purchase this equipment the State, of course, to acquire full title thereto, should reimburse each party for his or its respective interest therein, bearing in mind, as always, the reasonable market value of such equipment.

The very nature of your request requires that I also consider the disposition or use to be made of such equipment if acquired by the State of Alabama. In this regard, I must consider the facts you outline in the light of Section 93 of the Constitution of Alabama 1901. This constitutional section provides as follows:

"Sec. 93. The state shall not engage in works of internal improvement, nor lend money or its credit in aid of such; nor shall the state be interested in any private or corporate enterprise, or lend money or its credit to any individual, association, or corporation."

The first question to be considered is whether, in view of the above provision, the State may, itself, engage in the business of providing lunchroom facilities for its employees. In my opinion, it may, in no violation of the above constitutional provision. The evil at which Section 93, supra, strikes, and the practices that gave it birth, are well known. As pointed out in the case of **State Ex Rel Wilkinson v. Murphy**, 237 Ala.

332, 186 So. 487, such practices form a regrettable part of the history of our State, and no detailed consideration of those causes need here be given. The unfortunate experience, both as to the banking business and the lending of the State's credit to railroad construction, is well known to all. In that case, the court observed:

> "We think it clear enough these experiences resulted in the inhibitions of what is now section 93 of our Constitution. * * *"

In short, this prohibition was inserted as a limitation upon the power of the Legislature to place the State in business enterprise and in competition with private industries and corporations, or to undertake those things which ordinarily might, in human experience, be expected to be undertaken for profit or benefit to private promoters.

The value, and in truth the necessity, in our modern system of enterprise and productivity of affording to workers clean, wholesome and pleasant surroundings conducive to a more effective expenditure of their labors is a fact long known and recognized by employers in all fields of industrial activity. This certainly includes facilities for the feeding and relaxation of such employees. These facts the administrative body of a State government, an employer of many persons, surely may recognize and provide for. It is, therefore, my opinion that the State, in no violation of Section 93, supra, may provide lunching and recreational facilities for its employees. Such was not, in any sense, one of the evils sought to be curbed by Section 93, supra.

Further considering such proposition, it is my judgment that the State may provide such facilities in the manner deemed most expedient and advisable. This could very well be through the medium of a State Employees Social Club, as outlined in your request. If such be the case, the property purchased by the State for the equipping of such lunchrooms could be leased to such Club under terms agreeable to both parties, designed to best secure the interests of the State of Alabama and to accomplish the purposes desired. Such would not contravene the provision of Section 93, supra, to the effect that the State shall not lend money or its credit to any individual, association or corporation.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 30, 1948.

Hon. Wm. T. Seibels,
Solicitor,
Montgomery County,
Montgomery, Alabama.

Officers—Impeachments—

Sections 173-175, Constitution of Alabama 1901; Title 41, Sections 178, 180, 183 and 200, Code of Alabama 1940.

1. The power and authority to institute and prosecute impeachment proceedings against State officers other than those specifically named within the Constitution emanates from Section 174 of the Constitution and such proceedings should be instituted and had before the Supreme Court.

2. State officers, other than those named within the Constitution, who have no definite term of office but hold office at the will of the appointing authority, removable at his pleasure, are not subject to impeachment.

3. Under the provisions of Title 41, Section 200, Code of Alabama 1940, every grand jury is empowered and charged with the duty of investigating and making diligent inquiry concerning any alleged misconduct or incompetency of any public officer in the county which may be brought to its attention, including State officers.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of May 31, 1948, is as follows:

"I will appreciate it very much if you will give me your opinion concerning the following matter.

"Section 178 of Title 41, Code of Alabama provides that the following officers may be impeached and removed from office, to-wit: (Certain county officers) and all other state officers not named in section 173 of the Constitution * * *, * for the following causes, to-wit: Willful neglect of duty, corruption in office, incompetency, et cetera.

"Section 180 of Title 41 provides that proceedings under sections 174 and 175 of article 7 of the Constitution shall be instituted in the name of the State of Alabama, in the nature of an information by the Attorney General or the Solicitor.

"Section 200 of Title 41 provides that it shall be the duty of every Grand Jury to investigate and make diligent inquiry concerning any alleged misconduct or incompetency of any public officer in the county which may be brought to their notice; and if on such investigation and inquiry they find that such officer, for any cause mentioned in this chapter, ought to be removed from office, they shall so report to the court, setting forth the facts, which report shall be entered in the minutes of the court. This secion 200 further provides that if the officer so reported against is one of those included in section 174 of the Constitution, the report must be sent to the Attorney General, but refers to no other officer except those included in section 174, except the presiding judge of the court.

"Section 201 of Title 41 provides that it will be the duty of the Attorney General to institute proceedings under this chapter against any officer included in section 174, article 7 of the Constitution, and it shall be the duty of the Solicitor to institute proceedings under this chapter against any officer included in section 175, article 7, of the Constitution.

"In view of the fact that section 178 of Title 41 provides that all other state officers not named in section 173 of the Constitution may be impeached, and in view of the fact that the following sections, setting forth the manner in which state officers and county officers may be impeached, do not provide for any method of impeachment for those other state officers not mentioned in sections 174 and 175, and 173 of the Constitution, I am at a loss to determine how 'all other state officers' referred to in section 178, Title 41, of the Code, may be impeached. To mention specifically some of those other officers not named in sections 173, 174 and 175 of the Constitution,—the Director of the Highway Department, Finance Director, and many others, appointees of the Governor.

"I would also like to know if section 200 of Title 41, when it refers to any public officer in the county, means county officer, or is it broad enough to include any state officer who happens to be in the county. Most of the State officers, of course, are in Montgomery County.

"I will appreciate this very much if you will give me your opinion on these matters before June 8, 1948, when our Grand Jury reconvenes.

"This inquiry is not made with the view of taking any immediate proceeding against any specific officer; however, recent inquiries have been made of my office concerning such procedure.

"I am not giving this letter to the newspapers.

"Thanking you for your earliest attention to this matter."

Your request for opinion presents two questions for my consideration and response. You first inquire as to the method of procedure by which impeachment proceedings are to be instituted and prosecuted against State officers, other than those specifically named in the Constitution of Alabama 1901. In your request, you correctly cite and set out the constitutional and statutory provisions pertinent to such question.

Section 173, Constitution of Alabama 1901, provides that certain specifically named State officers, designated by their title of office, may be removed from office for any of the causes listed therein by the Senate sitting as a court of impeachment, under oath or affirmation, on articles or charges preferred by the House of Representatives. The procedure governing the conduct of such impeachment proceedings is likewise prescribed within Section 173.

Section 174, Constitution of Alabama 1901, provides that certain other named officers, including chancellors, judges of the circuit courts, judges of the probate courts, judges of any court from which an appeal may be taken directly to the Supreme Court, solicitors and sheriffs, may be removed from office for any of the causes stated within Section 173, supra, by the Supreme Court, under such regulations as may be prescribed by law. Section 175 of the Constitution provides for the impeachment of certain other officers, including county and municipal officers, and in my judgment, is not pertinent to your inquiry.

Section 174, supra, after providing for the impeachment of those designated officers listed therein, further provides that:

> "The legislature may provide for the impeachment or removal of other officers than those named in this article."

Pursuant to such authority, the Legislature has enacted the provision of law codified as Title 41, Section 178, Code of Alabama 1940, which statute, after designating by office certain of those officers subject to impeachment, provides for the impeachment of all other State officers not named in Section 173 of the Constitution. The ensuing statutes prescribe the procedure to be followed in such proceedings.

Title 41, Section 180 of such statutes, as stated by you in your request, provides that:

> "§180. Proceedings in name of state; upon whose information commenced.—Proceedings under sections 174 and 175 of article 7 of the constitution shall be instituted in the name of the State of Alabama, in the nature of an information, by the attorney general, or solicitor, or upon the information of such other persons as are

by this chapter allowed to institute the same; and all such proceedings shall be conducted, and all process shall issue, in the name of the State of Alabama."

Title 41, Section 183, provides that:

"§183. In supreme court; order, summons, and copy of information; continuances; precedence of cause.—If such information be filed under section 174 of article 7 of the constitution, the supreme court, in term time, or a justice thereof, in vacation, shall make an order, requiring the officer proceeded against to appear at a place, and on a day, which may be either in term time or vacation, to be specified in the order, and answer the information: the clerk of the court shall issue a summons, in which shall be set forth a copy of the order, directed to any sheriff of the State of Alabama, which, together with a copy of the information, shall be served on the defendant; and if the summons is served twenty days before the day specified in the order, the defendant shall answer the information on the day specified, and if the summons is served less than twenty days before the day so specified, the court, in term time, or a justice thereof, in vacation, shall, on the day so specified, make an order setting another day, not exceeding twenty days thereafter, on which the defendant shall answer the information; and another day may be set, and another summons issued, as often as may be necessary, and continuances may be granted in the discretion of the court; but the cases herein provided for shall have precedence and priority over all other business in the court."

Considering all the above constitutional and statutory provisions, it is my opinion that the power and authority to institute and prosecute impeachment proceedings against "all other State officers not named in Section 173 of the Constitution" emanates from the authority granted the Legislature by Section 174 of the Constitution to provide for the impeachment or removal of other officers than those named therein. Such being true, it is my further opinion that such proceedings should be instituted and prosecuted in conformity with the provisions of Title 41, Section 183, supra, and the statutes following prescribing the procedure to be followed in impeachment proceedings before the Supreme Court.

I deem it well here to point out that, in my opinion, those two officers, the Director of the Highway Department and the Director of the Department of Finance, specifically named by you in your request as being unmentioned within the constitutional provisions relative to impeachment, are not "state officers" within the meaning of such constitutional provisions and are not subject to removal thereunder. Each of these officers is appointed by the Governor, the Highway Director under the authority of Title 23, Section 2, Code of Alabama 1940, and the Director of the Department of Finance under the authority of Title 55, Section 64, Code of Alabama 1940. Neither of such officers has any

definite term of office and each is subject to removal by the appointing authority at any time, with or without cause. In short, each holds office at the pleasure of the appointing authority, the Governor.

It has been long established within this State that the constitutional mode of removal is exclusive of any other form of removal of an officer subject thereto. Where the Constitution provides the mode for the removal of an officer by impeachment, it is a denial of any other mode of removal. **Nolen v. State,** 118 Ala. 154, 24 So. 251. Therefore, were it true that such officers were subject to removal by impeachment, they could not be removed by the Governor, or any other person or process. Such we know not to be the case, it being settled that such officers hold office only at the pleasure of the Governor and may be removed by him at any time.

As has been noted by text writers on this subject, due to the nature of such cases, relatively few judicial decisions exist pertinent thereto. It is likewise well stated within 42 Am. Juris., Public Officers, page 879, that:

> "There are numerous and varied definitions of the terms 'office,' 'officer,' 'public office,' and 'public officer' as used in statutes and Constitutions. They are terms of vague and variant import, the meaning of which necessarily varies with the connection in which they are used, and, to determine it correctly in a particular instance, regard must be had to the intention of the statute and the subject matter in reference to which the terms are used. * * *"

The decision of the Supreme Court of Alabama I find treating the question here considered support the above conclusion, if not by direct language, by strong and unmistakable inference.

The court in the case of **Cooper v. State ex rel Hawkins,** 226 Ala. 288, 147 So. 432, in treating the office of member of the board of registrars and the removal from same, stated:

> "It is also insisted that the registrars in office at the time of the passage and approval of the act were county officers, with fixed terms, and were therefore subject to removal only by impeachment as provided in section 175 of the Constitution, and for causes enumerated in section 173 of the same instrument."

After discussion as to the phrase "terms of office," the court continued:

> "* * * We conclude that the registrars were without fixed terms. Even if this were not true, the chairmen of the boards of registrars designated as such by the appointive board under the provisions of section 370 of the Code, certainly have no fixed terms as such chairmen. The power that designated them, can remove them; there being nothing in the Constitution or statute prohibiting the same. Touart v. State, 173 Ala. 453, 56 So. 211."

Again, in the case of **Bradford v. State ex rel. Esslinger**, 226 Ala. 342, 147 So. 182, the court in considering and treating the office of city attorney and the removal from same, observed as follows:

> "We are therefore of the opinion, and so hold, that the relator was an officer with a fixed term of an incorporated city in this state, removable by impeachment under section 175 of the Constitution of 1901. This being the case, he could only be removed by impeachment. Nolen v. State, 118 Ala. 154, 24 So. 251; Touart v. State ex rel. Callaghan, 173 Ala. 453, 56 So. 211; Williams v. State, 197 Ala. 40, 72 So. 330; Ann. Cas. 1918D, 869; Franklin County v. Richardson, 202 Ala. 46, 79 So. 384; Petree v. McMurray, 210 Ala. 639, 98 So. 782."

It is, therefore, my opinion that it is a necessary requisite that one whose removal is sought by impeachment hold office for a definite term and not merely at the will and pleasure of the appointing authority and subject to removal at any time. It must be assumed that in such case, one guilty of misconduct, fraud, corruption, or the like in office, would be removed by the appointing authority and, hence, resort to impeachment would be unwarranted and unnecessary.

With reference to your second inquiry concerning the duty of the grand jury of Montgomery County, under Title 41, Section 200, Code of Alabama 1940, it is my opinion that the duty and authority of such grand jury relative to investigation and report on alleged misconduct in office of public officers is not restricted to county officers alone. Such statute provides as follows:

> "§200. Duty of grand jury; when report of grand jury transmitted to attorney general.—It shall be the duty of every grand jury to investigate and make diligent inquiry concerning any alleged misconduct or incompetency of any public officer in the county, which may be brought to their notice; and if, on such investigation and inquiry, they find that such officer, for any cause mentioned in this chapter, ought to be removed from office, they shall so report to the court, setting forth the facts, which report shall be entered on the minutes of the court. If the officer so reported against is one of those included in section 174, article 7, of the constitution, the clerk of the court shall transmit a certified copy of such report to the attorney general. If the officer so reported against is the presiding judge of the court, the report must not be made to the court, or entered on the minutes; and, in such cases, the report of the grand jury must be signed by the foreman, and countersigned by the solicitor of the circuit, who must transmit the same to the attorney general."

The verbiage of such statute refutes any assertion that the duty of the grand jury thereunder is restricted to investigation and report on county officers alone. It is to be noted that it is the duty of every

grand jury to investigate and make diligent inquiry concerning any alleged misconduct or incompetency of **any public officer in the county,** which may be brought to their notice.

It is also to be noted that such statute makes provision for the transmittal of the report of such grand jury in the event the officer so reported against is one of those officers included in Section 174 of the Constitution. As has been previously stated herein, Section 174, supra, concerns State officers and it is also the holding of this opinion that the power and authority to institute and prosecute impeachment proceedings against State officers other than those named within Section 173 of the Constitution emanates from said Section 174. It is, therefore, my opinion that under the provisions of the above-quoted Section 200, the grand jury is empowered and charged with the duty to investigate and report on the alleged misconduct or incompetency of any public officer in the county, including public officers of the State, and not county officers alone.

Nothing herein shall be construed as holding that a grand jury has the right, in its report, to criticize a public officer and his official acts in the absence of a recommendation for his impeachment or an indictment. **Ex Parte Robinson,** 231 Ala. 503, 165 So. 582.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

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